

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 550

WALTER A. LAVENDER, ADMINISTRATOR DE
BONIS NON OF THE ESTATE OF L. E. HANEY,
DECEASED, PETITIONER,

vs.

J. M. KURN, ET AL., TRUSTEES OF ST. LOUIS-SAN
FRANCISCO RAILWAY COMPANY, DEBTOR, AND
ILLINOIS CENTRAL RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF MISSOURI

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[fol. a] UNITED STATES OF AMERICA,
State of Missouri, ss:

Be It Remembered that, heretofore, to-wit, on the 14th day of June, 1944, there were filed in the office of the Clerk of the Supreme Court of the State of Missouri, in a cause entitled Walter A. Lavender, Administrator de bonis non of the Estate of Lyman Elmar Haney, deceased, respondent, against J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, debtor, and Illinois Central Railroad Company, a corporation, appellants, No. 39,174, certified transcripts which included the judgment of the Circuit Court of the City of St. Louis, and the order of said circuit court granting appeals from said judgment to the Supreme Court of Missouri, said transcripts being in words and figures following, to-wit:

STATE OF MISSOURI,
City of St. Louis, ss:

Be It Remembered, that heretofore, to-wit: at the February Term, Nineteen Hundred and Forty-Four of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the third day of March, 1944, it being the twenty-second day of the February Term, 1944, of said Court, the following proceedings were had in cause No. 45112 Series "C" of the causes in said Court, wherein Walter A. Lavender, Administrator de bonis non of the Estate of Lyman Elmar Haney, deceased, is plaintiff, and J. M. Kurn and Frank A. Thompson, Trustees of St. Louis San Francisco Railway Company, debtor, and Illinois Central Railroad Company, a corporation, are defendants, to-wit:

[fol. b]

Friday, March 3rd, 1944.

No. 45112-C

WALTER A. LAVENDER, Administrator de bonis non of the
Estate of Lyman Elmar Haney, deceased,

vs.

J. M. KURN AND FRANK A. THOMPSON, Trustees of St. Louis
San Francisco Railway Company, debtor, and Illinois
Central Railroad Company, a Corporation

Now at this day this cause again coming on for hearing come again the parties hereto by their respective attorneys, comes also again the jury heretofore sworn and impaneled herein; thereupon the further trial of this cause is resumed and progresses before the Court and at the close of all the evidence, the defendants present to the Court their separate instructions in the nature of demurrers to the evidence, and the Court having seen and examined the same and being sufficiently advised thereof, doth order that said instructions be refused and filed; thereupon the trial of this cause being terminated and the argument of counsel closed, the same is submitted to the jury, and the jurors aforesaid, upon their oaths as aforesaid, say:

"We, the jury in the above entitled cause, find the issues joined in favor of the plaintiff and against all of the defendants, and we assess plaintiff's damages in the sum of 30,000 dollars

Canice T. Rice, Foreman."

and the jury being polled, all the jurors say that they concur.

Wherefore, it is considered and adjudged by the Court that the plaintiff have and recover out of the assets and effects of the Estate of the St. Louis San Francisco Railway Company, now in the hands of J. M. Kurn and Frank A. Thompson, Trustees and from the Illinois Central Railroad Company, a corporation, the sum of Thirty Thousand and no/100 (\$30,000.00) Dollars, together with the costs of this proceeding, for which let execution issue.

[fol. c]

Verdict and Instructions, Filed

And thereafter at the April Term, 1944, of said Court, the following further proceedings were had in said cause, to-wit:

Monday, May 15th, 1944.

No. 45112-C

WALTER A. LAVENDER, Administrator de bonis non of the Estate of Lyman Elmar Haney, deceased,

vs. •

J. M. KURN AND FRANK A. THOMPSON, Trustees of St. Louis San Francisco Railway Company, debtor, and Illinois Central Railroad Company, a Corporation

Now at this day comes the defendant, Illinois Central Railroad Company, a corporation, by attorney, and upon motion and for good cause shown, the Court doth grant said defendant ninety days additional time within which to file its Bill of Exceptions herein; thereupon, the said defendant files and presents to the Court its affidavit for an appeal and prays an appeal to the Supreme Court of Missouri, and the Court having seen and examined the same, doth order that an appeal be and is hereby allowed the Illinois Central Railroad Company, a corporation, to the Supreme Court of Missouri from the judgment or decision of the Court heretofore rendered herein.

Thereupon, come the plaintiff by attorney and defendant, Illinois Central Railroad Company, a corporation, by attorney, and file and present to the Court a stipulation wherein said parties consent and agree that the defendant's appeal bond herein in the sum of \$40,000.00 may be accepted by the Court as such appeal bond, and upon approval thereof, shall act as a supersedeas in said defendant's behalf in this case.

Whereupon, said defendant presents to the Court its appeal bond conditioned according to law in the penal [fol. d] sum of \$40,000.00, with the Manufacturers Casualty Insurance Company, as surety, and the Court having seen and duly considered the same, doth order that said bond be approved and filed, which is now accordingly done.

STATE OF MISSOURI,
City of St. Louis, ss:

I, H. Sam Priest, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, certify the above and foregoing to be a full, true and complete transcript of the record entry of the judgment in the above entitled cause, showing the term and day of the term, month and year upon which the same was rendered, together with the order granting the appeal in the above entitled cause, as fully as the same remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 22nd day of May, 1944.

H. Sam Priest, Clerk, Circuit Court. (Seal.)

STATE OF MISSOURI,
City of St. Louis, ss:

Be It Remembered, that heretofore, to-wit: at the February Term, Nineteen Hundred and Forty-four of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the third day of March, 1944, it being the twenty-second day of the February Term, 1944, of said Court, the following proceedings were had in cause No. 45112 Series, "C" of the causes in said Court, wherein Walter A. Lavender, Administrator de bonis non of the [fol. e] Estate of Lyman Elmar Haney, deceased, is plaintiff, and J. M. Kurn and Frank A. Thompson, Trustees of St. Louis San Francisco Railway Company, debtor, and Illinois Central Railroad Company, a corporation, are defendants, to-wit:

Friday, March 3rd, 1944.

No. 45112-C

WALTER A. LAVENDER, Administrator de bonis non of the
Estate of Lyman Elmar Haney, Deceased,

vs.

J. M. KURN and FRANK A. THOMPSON, Trustees of St. Louis
San Francisco Railway Company, Debtor, and Illinois
Central Railroad Company, a Corporation

Now at this day this cause again coming on for hearing come again the parties hereto by their respective attorneys, comes also again the jury heretofore sworn and impaneled

herein; thereupon the further trial of this cause is resumed and progresses before the Court and at the close of all the evidence, the defendants present to the Court their separate instructions in the nature of demurrers to the evidence, and the Court having seen and examined the same and being sufficiently advised thereof, doth order that said instructions be refused and filed; thereupon the trial of this cause being terminated and the argument of counsel closed, the same is submitted to the jury, and the jurors aforesaid, upon their oaths as aforesaid, say:

"We, the jury in the above entitled cause, find the issues joined in favor of the plaintiff and against all of the defendants, and we assess plaintiff's damages in the sum of 30,000 Dollars.

Canice T. Rice, Foreman."

and the jury being polled, all the jurors say that they concur.

[fol. f] Wherefore, it is considered and adjudged by the Court that the plaintiff have and recover out of the assets and effects of the Estate of the St. Louis San Francisco Railway Company, now in the hands of J. M. Kurn and Frank A. Thompson, Trustees and from the Illinois Central Railroad Company, a corporation, the sum of Thirty Thousand and no 100 (\$30,000.00) Dollars, together with the costs of this proceeding, for which let execution issue.

Verdict and Instructions, filed.

And thereafter at the April Term, 1944, of said Court, the following further proceedings were had in said cause, to-wit:

Friday, May 19th, 1944

No. 45112-C

WALTER A. LAVENDER, Administrator de bonis non of the Estate of Lyman Elmar Haney, Deceased.

vs.

J. M. KURN and FRANK A. THOMPSON, Trustees of St. Louis San Francisco Railway Company, Debtor, and Illinois Central Railroad Company, a Corporation

Now at this day come the defendants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis San Francisco Railway Company, debtor, by attorneys, and file and present to the Court their separate application and affidavit for an appeal and pray an appeal to the Supreme Court of Mis-

souri, and the Court having seen and examined the same, doth order that an appeal be and is hereby allowed the defendants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis San Francisco Railway Company, debtor, to the Supreme Court of Missouri from the judgment or decision of the Court heretofore rendered herein.

STATE OF MISSOURI,
City of St. Louis, ss:

I, H. Sam Priest, Clerk of the Circuit Court, City of St. [fol. g] Louis, within and for the City and State aforesaid, certify the above and foregoing to be a full, true and complete transcript of the record entry of the judgment in the above entitled cause, showing the term and day of the term, month and year upon which the same was rendered, together with the order granting the appeal in the above entitled cause, as fully as the same remain of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 25th day of May, 1944.

H. Sam Priest, Clerk, Circuit Court. (Seal.)

And thereafter and on the same day the following proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Admr. d. b. n., Respondent,

vs.

J. M. KURN et al., Trustees, et al., Appellants

Now at this day, it is ordered by the Court that this cause be, and the same is hereby assigned to Division One.

And thereafter and on the 28th day of November, 1944, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E. Haney, Deceased, Respondent,

vs.

J. M. KURN et al., Appellants

Come now the appellants, by attorney, and file their joint abstract of record, with service copy, in the above-entitled cause.

[fol. 1] Which said appellants' joint abstract of the record is in words and figures following, to-wit:

**IN THE SUPREME COURT OF MISSOURI, DIVISION
No. 1**

September Term, 1944 (January Call, 1945)

No. 39,172

WALTER A. LAVENDER, Administrator d. b. n. of the Estate
of L. E. Haney, Deceased, (Plaintiff) Respondent,

vs.

J. M. KERN et al., Trustees of St. Louis-San Francisco
Railway Company, Debtor, and Illinois Central Railroad
Company, (Defendants) Appellants

Appeal from the Circuit Court of the City of St. Louis, Mo.,
Division No. 4, Honorable Joseph J. Ward, Judge

Appellants' Joint Abstract of Record—Filed November 28,
1944

The original petition in the above entitled cause was filed in the office of the Clerk of the Circuit Court of the City of St. Louis on the 15th day of November, 1940.

The suit was originally against the Trustees of St. Louis-San Francisco Railway Company, Debtor, alone.

Summons was duly issued and served upon said defendants and in due time they appeared and filed a pleading in response to said original petition.

Thereafter on the 31st day of March, 1942, an amended petition was filed by plaintiff, and on the 11th day of June, 1942, said defendants filed an answer thereto.

Thereafter on the 22nd day of October, 1942, plaintiff filed a second amended petition, in which he named the defendant, [fol. 2] ant, Illinois Central Railroad Company, as a defendant, in addition to said Trustees. Service of said second amended petition and a summons ordering said Illinois Central Railroad Company to appear at the December, 1942 Term of said Court, was duly had upon said defendant Illinois Central Railroad Company in time for the December Term of Court.

On the 24th day of December, 1942, plaintiff filed a third amended petition, which is as follows (omitting caption and signature):

THIRD AMENDED PETITION

Plaintiff for his cause of action and for the third amended petition filed herein states that he is the duly appointed, qualified and acting administrator de bonis non of the estate of Lyman Elmer Haney, deceased; that plaintiff was on the 29th day of September, 1942, duly appointed administrator d. b. n. of the estate of Lyman Elmer Haney, deceased, by the Probate Court of the City of St. Louis, Missouri, after the letters of administration issued to Evelyn Burke had been at her request revoked by the Court on account of the said Evelyn Burke entering the military service of the United States.

Plaintiff further states that the defendants J. M. Kurn and John G. Lonsdale are and were at all the times herein-after mentioned the duly appointed and acting trustees of the St. Louis-San Francisco Railway Company, a corporation, and as such trustees said defendants at all the times hereinafter mentioned owned, operated and controlled all of the trains, cars, tracks, yards, switches, equipment and other property of the said St. Louis-San Francisco Railway Company, a corporation.

Plaintiff further states that the Illinois Central Railroad Company is and was at all the times hereinafter mentioned a corporation duly organized and existing under and by [fol. 3] virtue of law and at all the times herein referred to said defendant Illinois Central Railroad Company owned, operated and controlled a number of railroads, trains, switch tracks, main lines and other railroad equipment used in the operation of its said railroads.

Plaintiff further states that defendants were at all the times hereinafter mentioned engaged in operating lines of steam railways as common carriers by railroad for hire of passengers, merchandise, livestock and other personal property and freight between the City of Memphis in the State of Tennessee, and points to and beyond the State of Tennessee, and to the states of Alabama, Arkansas and Missouri and other states of the United States; that defendants during all of the times hereinafter mentioned were engaged in running and operating locomotives and freight and pas-

senger trains in the transportation of interstate commerce and interstate freight over their various lines of railroads from points in the States of Missouri and Alabama and other states to points in the State of Tennessee to points and towns and cities in other states.

Plaintiff further states that at the time Lyman Elmer Haney was injured and killed as hereinafter stated, he was in the employ of the defendants, and as such was employed and engaged in working for the defendants as a switch tender, and as such was employed and engaged in working for the defendants as a switch tender in throwing, setting and regulating switches for railroad cars which were being used and which for a long time prior thereto had been used by the defendants in interstate commerce; that at the time plaintiff's intestate, Lyman Elmer Haney, was injured and killed as hereinafter stated he was engaged in interstate commerce, and that both said Lyman Elmer Haney and the defendants at the time Lyman Elmer Haney was injured and killed were engaged in interstate commerce, and that while said Lyman Elmer Haney was in the service of the defendants, and while working within the line of his duty [fol. 4] and within the scope of his employment as a servant of the defendants, he was injured and killed.

Plaintiff further states that on or about the 21st day of December, 1930, while said Lyman Elmer Haney was working in the line of his duties and within the scope of his employment as a servant of the defendants in the defendant's switch yard of the said Grand Central Station at Memphis, Tennessee, he was ordered, directed and required by the defendants to throw or open a switch so that defendants J. M. Kurn and John G. Lonsdale, trustees of the St. Louis-San Francisco Railway Company, debtors, could back an interstate Frisco passenger train into the said Grand Central Station and defendants ordered and required said Lyman Elmer Haney, as said Frisco passenger train was being backed into said station and past said switch, to remain at said switch and after said train had backed over said switch track to immediately close or reline said switch on the track over which said Frisco passenger train had backed into said station; that said Lyman Elmer Haney did in pursuance to his duty and as a servant of defendants on said last mentioned date open said switch and the defendants J. M. Kurn and John G. Lonsdale, trustees, etc., their agents, servants and employes in charge of and operating

said Frisco passenger train, did back said long interstate Frisco passenger train over the track of the switch which said Lyman Elmer Haney had opened, and past Lyman Elmer Haney and that as said Frisco passenger train was backed past where said Lyman Elmer Haney was standing near said switch, the defendants J. M. Kurn and John G. Lonsdale, trustees, etc., negligently caused, suffered and permitted a rod, stick or some other object to project out or swing out from the side of said Frisco passenger train and to strike said Lyman Elmer Haney, knocking him to the [fol. 5] ground and injuring him so severely that he died as a direct result of said injuries so received on the 21st day of December, 1939.

Plaintiff further states that said interstate Frisco passenger train so backed into said Grand Central Station by defendants J. M. Kurn and John G. Lonsdale, trustees, etc., was in the exclusive possession and under the exclusive control of defendants J. M. Kurn and John G. Lonsdale, trustees, etc., and was not under the control or in the possession of said Lyman Elmer Haney.

Plaintiff further states that defendant Illinois Central Railroad Company was guilty of negligence which caused or contributed to cause the injury and death of said Lyman Elmer Haney, in the following respects, to-wit:

1. In negligently failing and refusing to furnish Lyman Elmer Haney with a reasonably safe place in which to work and perform the duties assigned to him and which he was required to do in that the ground was high and uneven near said switch and the light was insufficient and inadequate and the backing train had some object, rod or stick projecting or swinging out to the side near said switch.

2. In negligently failing and refusing to furnish and provide said Lyman Elmer Haney with reasonably sufficient lights at the place where he was required to work so that said Lyman Elmer Haney could see and could be seen and thereby be reasonably safe in doing the work required of him to be done by defendants.

3. In negligently failing and refusing to furnish and provide said Lyman Elmer Haney with proper and safe equipment to do the work required of him to be done, as alleged

and set out in assignments of negligence numbers 1 and 2 herein.

4. In negligently furnishing and providing a place for said Lyman Elmer Haney to work which was unsafe and [fol. 6] dangerous as described and set out in assignments of negligence numbers 1, 2 and 3 herein.

Plaintiff further states that said Lyman Elmer Haney at all the times herein mentioned was the husband of Julia B. Haney, and lived and resided with the said Julia B. Haney and maintained and supported her, that he also left surviving him on his death two children, Alvin A. Haney, age 25, and Marjorie Haney Linson, age 22; that said Julia B. Haney and said children above mentioned are the only children and heirs at law which said Lyman Elmer Haney left upon his death, and that said Lyman Elmer Haney at the time he was killed as aforesaid was 48 years of age and regularly employed at a salary of \$160.00 per month.

Plaintiff further states that by reason of the death of said Lyman Elmer Haney as a direct and proximate result of the negligence of the defendants, as aforesaid, a cause of action has accrued to this plaintiff for the benefit of said Julia B. Haney, Alvin A. Haney and Marjorie Haney Linson and against the defendants in the sum of Sixty five Thousand and No. 100 Dollars (\$65,000.00), for which sum, together with costs of this suit, plaintiff prays judgment against the defendant.

Thereafter, on the 28th day of December, 1942, the Trustees of said St. Louis-San Francisco Railway Company filed their demurrer to said third amended petition, which (omitting caption and signatures) is as follows:

SEPARATE DEMURRER OF DEFENDANTS J. M. KUHN AND JOHN G. LONSDALE, TRUSTEES OF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Debtors

Come now defendants J. M. Kuhn and John G. Lonsdale, Trustees of St. Louis-San Francisco Railway Company, debtor, separate and apart from their co-defendant herein, [fol. 7] and demur to plaintiff's third amended petition filed herein upon the grounds and for the reasons following:

1. Because said third amended petition fails to state facts sufficient to constitute a cause of action against these defendants.

2. Because it appears upon the face of said third amended petition that plaintiff is not a proper party and does not have legal capacity to institute and prosecute this suit.

3. Because it appears upon the face of said third amended petition that there is a defect of parties defendant.

Thereafter, on the 4th day of January, 1943, the defendant Illinois Central Railroad Company, by leave of court, filed its demurrer to said third amended petition which (omitting caption and signatures) is as follows:

DEMURRER OF DEFENDANT ILLINOIS CENTRAL RAILROAD COMPANY

Comes now the defendant Illinois Central Railroad Company, appearing for itself alone, and demurs to plaintiff's third amended petition filed herein, for the reason following, to-wit:

Because said third amended petition does not state facts sufficient to constitute a cause of action against this defendant.

Thereafter, on the 8th day of February, 1943, at the February Term of said court, the said demurrer of said Trustees was overruled by order duly entered of record in said cause. [fol. 8] Thereafter, on the 12th day of February, 1943, the said Trustees filed their answer to said third amended petition, which answer, omitting caption and signatures, is as follows:

SEPARATE ANSWER OF DEFENDANTS, J. M. KURN AND FRANK A. THOMPSON, TRUSTEES OF ST. LOUIS SAN FRANCISCO RAILWAY COMPANY, DEBTOR, TO THIRD AMENDED PETITION

Comes now defendants J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, debtor, separate and apart from their co-defendant herein, and for their answer to plaintiff's third amended petition filed herein deny all and singular each and every allegation in said third amended petition contained.

Wherefore, having fully answered, these defendants pray to be hence discharged with their costs herein expended.

Thereafter, on the 30th day of April, 1943, the separate demurrer of defendant Illinois Central Railroad Company, was overruled, by order of court entered in said cause.

Thereafter on the 13th day of May, 1943, said defendant, Illinois Central Railroad Company, filed its answer to said third amended petition, which answer, omitting caption and signatures, is as follows:

ANSWER TO THIRD AMENDED PETITION

Comes now defendant, Illinois Central Railroad Company, appearing for itself alone, and for answer to the third amended petition filed by plaintiff herein, denies each and every allegation therein contained.

Wherefore, having fully answered said third amended petition, this defendant prays to be hence dismissed with its costs.

[fol. 9]

VERDICT

Thereafter, on the 28th day of February, 1944, it being one of the days of the February, 1944, Term of said court, said cause was regularly assigned to Division No. 9 of said court, and the trial of said cause was begun before Honorable Joseph J. Ward, Judge of said court, and a jury, and not being completed on said day said trial progressed on February 29, March 1, March 2 and March 3, 1944, on which last mentioned date and at said February Term of court, said trial was concluded and resulted in a verdict in favor of plaintiff and against all of the defendants for the sum of \$30,000.00, and judgment was duly entered on said verdict.

MOTIONS FOR NEW TRIAL

Thereafter, on the 7th day of March, 1944, it being one of the days of the February, 1944, Term of said court, defendant Illinois Central Railroad Company filed its motion for a new trial of said cause, and on said day and at said term of court the defendants, the trustees of St. Louis-San Francisco Railway Company, filed their motion for a new trial of said cause.

—ORDER OVERRULING MOTIONS FOR NEW TRIAL

Thereafter, on the 24th day of April, 1944, it being one of the days of the April, 1944, Term of said court, the court, by order duly entered of record in said cause, overruled both of said motions for a new trial of said cause.

ORDERS ALLOWING APPEALS

Thereafter, on the 15th day of May, 1944, it being one of the days of the April, 1944, Term of said court, the court allowed defendant Illinois Central Railroad Company ninety days to file its bill of exceptions, fixed its appeal bond in the sum of \$40,000.00, and the said defendant having filed its application on said day, duly supported by affidavit, praying an appeal of said cause to the Supreme Court of Missouri, said defendant was duly granted an appeal of said cause to said court, the docket fee of \$10.00 [fol. 10] for the Supreme Court having been on said day paid to the clerk of the circuit court. In due time said appeal bond was filed and approved, pursuant to stipulation filed.

Thereafter, on the 19th day of May, 1944, it being one of the days of the April, 1944, Term of said court, the court allowed defendants, the Trustees of St. Louis-San Francisco Railway Company, ninety days to file their bill of exceptions, and the said defendants having filed their application on said day, duly supported by affidavit, praying appeal of said cause to the Supreme Court of Missouri, said defendants were duly granted an appeal of said cause to said court, the docket fee of \$10.00 for the Supreme Court having been on said day paid to the clerk of the circuit court.

BILL OF EXCEPTIONS FILED

Thereafter, within the time allowed by law and on the 27th day of November, 1944, it being one of the days of the September, 1944, Term of said court, the defendants presented in open court their joint bill of exceptions in said cause, the same having already been signed by Honorable Joseph J. Ward, who was the Judge presiding at the trial of said cause, and the same was thereupon approved, allowed, signed by the Judge presiding in said division at the time of the filing of the same, and was by order of court duly entered in said cause, filed and made a part of the record in said cause.

Said bill of exceptions is here set forth in abstract. It is as follows:

[fol. 11] IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS,
STATE OF MISSOURI

No. 45,112, Div. No. 9

WALTER A. LAVENDER, Administrator de bonis non of the
Estate of Lyman Elmer Hagey, Deceased, Plaintiff,

vs.

J. M. KURN and FRANK A. THOMPSON, Trustees of the St.
Louis-San Francisco Railway Company, Debtor, and Illi-
nois Central Railroad Company, a Corporation, Defend-
ants

Defendants' Joint Bill of Exceptions

Be It Remembered, That at the February Term of the
said Circuit Court of the City of St. Louis, State of Mis-
souri; and on the 28th day of February, 1944, the above
styled cause came on to be tried and was tried before the
Hon. Joseph J. Ward, Judge of the Circuit Court of the
City of St. Louis, State of Missouri, presiding in Division
No. 9 thereof, and a jury; the parties appearing by their
respective attorneys as follows:

APPEARANCES:

N. Murray Edwards, Esq., and Martin P. Hart, Esq., for
the plaintiff.

A. P. Stewart, Esq., and C. H. Skinker, Jr., Esq., for the
defendants J. M. Kurn and Frank A. Thompson, Trus-
tees of St. Louis-San Francisco Railway Company,
Debtor.

William R. Gentry, Esq., for the defendant Illinois Cen-
tral Railroad Company.

[fol. 12]

Plaintiff's Evidence

Thereupon the plaintiff, to sustain the issues in his be-
half, offered and introduced the following evidence, to wit:

Plaintiff's counsel handed to the reporter two documents
marked, respectively, Plaintiff's Exhibits 1 and 2, and stated
that he desired to offer them in evidence.

By Mr. Gentry: I understand that plaintiff is ready to
make the first offer.

By Mr. Edwards: That's right.

By Mr. Gentry: At this time the defendant, Illinois Central Railroad Company, objects to the introduction of any evidence in the case as against Illinois Central Railroad Company for the reason plaintiff's third amended petition does not state facts sufficient to constitute a cause of action against that defendant.

By Mr. Skinker: Defendant, Frisco Trustees, object to the introduction of any evidence for the reason that plaintiff's third amended petition upon which the case is being tried, fails to state facts sufficient to constitute a cause of action against said defendant, Frisco Trustees.

By the Court: Objections overruled.

To which ruling of the Court the defendants and each of them, then and there duly excepted and still continue to except.

PLAINTIFF'S EXHIBIT 1

Plaintiff thereupon offered in evidence his Exhibit 1, being the letters of administration on the estate of Lyman Elmer Haney, deceased, issued by the Probate Court of the City of St. Louis, Mo., on November 15, 1940, appointing Evelyn Burke as administratrix of the estate of Lyman Elmer Haney, deceased.

(It is unnecessary to set out said exhibit, as it was a certified copy of letters of administration in the usual form provided for by the Missouri Statutes.)

[fol. 13]

PLAINTIFF'S EXHIBIT 2

By Mr. Edwards: I next want to offer in evidence Plaintiff's Exhibit 2, which is letters of administration showing the revocation of the letters to Evelyn Burke, at her request, and the appointment of Walter A. Lavender, as administrator de bonis non of the estate of Lyman Elmer Haney, deceased, and who is the plaintiff at this time.

(What was said of Exhibit 1 is true of Exhibit 2, and, therefore, it is unnecessary to set it out.)

By Mr. Edwards: Mr. Skinker, may I have the admission—I understand, Mr. Skinker, it will be admitted by you and your client, and Mr. Gentry and his client, that Frisco passenger train 106, which arrived at the Grand Central

Station in Memphis, Tennessee, on the evening of December 21, 1939, commenced its run at Birmingham, Alabama, and was an interstate train.

By Mr. Skinker: That's right, as far as we are concerned, he may read the entire letter which constitutes the agreement we made, with certain exceptions.

By Mr. Gentry: I don't agree to all those things, but I admit that was an interstate train.

By Mr. Edwards: I have noted those you told me about.

By Mr. Skinker: You can read it all as to me, and let him object to whatever he desires.

By Mr. Edwards: This is admission that the defendants are making in this case to obviate the necessity of making proof of this fact. I just read one. Number two—I have just read the admission it was an interstate commerce passenger train, No. 106. Number two are photostatic copies of the hospital records at St. Joseph's Hospital, Memphis, Tennessee, December 21, 1939, in connection with the death of Lyman Haney, is a correct copy of the original of said hospital records, kept in the regular course of hospital business and may be used in the trial of the above case for all purposes for which such records might be used.

By Mr. Gentry: I make that admission.

[fol. 14] By Mr. Skinker: I make everything that is in the record referred to.

By Mr. Edwards: Number three, this is not admitted by Mr. Gentry.

By Mr. Gentry: That is correct.

By Mr. Edwards: But it is admitted by Mr. Skinker for the Frisco Railroad Company as being true. This one I will read to you: "3. That on and prior to December 21, 1939, Lyman Elmer Haney was employed by the Illinois Central Railroad Company, or a subsidiary corporation thereof, known as the Y. & M. V. Railroad Company, as a switch tender in the railroad yards at the Grand Central Station at Memphis, Tennessee; that his duties included the throwing of switches for said railroad and also the Frisco and other railroads using the Grand Central Station, and that for his said services, the Frisco Trustees agreed with the Illinois Central Railroad Company to and did reimburse the railroad company for 2/12 of said Haney's wages." That is admitted by the Frisco Railroad Company, but is not admitted by the Illinois Central Railroad Company?

By Mr. Gentry: That is correct; the statement is not admitted by us.

By Mr. Edwards: Correct. Now, gentlemen, I will read to you another admission that is made by the Frisco Railroad Company, by Mr. Skinker, only part of it is made by Mr. Gentry—I will show you that later: "4. That a written contract dated the 27th day of March, 1934, by and between the Illinois Central Railroad Company and J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railroad Company, debtor, with print thereto attached, marked Exhibit A, together with letters dated May 23, 1934, from W. Atwill, Vice-President and General Manager of the Illinois Central Railroad Company to H. L. Woerman, Chief Operating Officer, St. Louis-San Francisco Railway Company, St. Louis, Missouri, and letter dated May 28, 1934, [fol. 15] from H. L. Woerman, Chief Operating Officer for Frisco Trustees, to W. Atwill, V. P. & G. M., Illinois Central System, Chicago, Illinois, were in full force and effect on December 21, 1939, and have been since the dates thereof, and plaintiff's photostatic copies thereof are true and correct copies of the original document in the office of the secretary for the Trustees of the said Frisco Railroad Company. Said Trustees, however, deny that the document referred to in this paragraph applies to the employment of said Lyman Haney, and deny that said document applies to or includes the location or portion of said railroad yards where said Lyman Elmer Haney received his fatal injuries." That is admitted by the Frisco Railroad Company, but not by Mr. Gentry.

By Mr. Gentry: It is all admitted by me with the exception of two or three words there.

By Mr. Edwards: That's right.

By Mr. Gentry: The words which I do not admit are these: "or portion of said railroad yards." If that is eliminated I will admit the entire paragraph.

By Mr. Edwards: You admit paragraph 4 with the exception of what you have stated.

By Mr. Gentry: That is correct.

By Mr. Gentry: That letter you read was Exhibit 4?

By Mr. Edwards: It is marked in the letter from Mr. Skinker to me as 4, but is Exhibit 3, Plaintiff's Exhibit 3.

By Mr. Gentry: I thought the photostatic copy of the hospital records was Plaintiff's Exhibit 3.

By Mr. Edwards: That's right; we will mark the hospital records Plaintiff's Exhibit 3 and this will be Exhibit 4.

By Mr. Gentry: What about the letter you just read.

By Mr. Edwards: I didn't offer the letter; I just read what he said he would admit. However, let this be marked Plaintiff's Exhibit 4.

[fol. 16] (At this point the hospital record referred to was marked by the reporter, for the purpose of identification, "Plaintiff's Exhibit 3, G. P. B., 2-28-44.")

(The said letter above referred to was marked by the reporter, for the purpose of identification, "Plaintiff's Exhibit 4, G. P. B., 2-28-44.")

By Mr. Skinker: We have agreed that the portion of the letter he read be marked Plaintiff's Exhibit 5 and be put in.

By Mr. Edwards: Letter to be marked Plaintiff's Exhibit 5 is the letter Mr. Skinker wrote me about the admission.

(At this point a letter was marked by the reporter, for the purpose of identification, "Plaintiff's Exhibit 5, G. P. B., 2-28-44.")

By Mr. Edwards: Then I will offer in evidence Plaintiff's Exhibit 5, which is letter dated October 3, 1943, addressed to N. Murry Edwards, Attorney, 112 North Fourth Street, St. Louis, Missouri, on the stationery of the St. Louis-San Francisco Railroad Company and signed by C. H. Skinker, attorney for defendants Kurn and Lonsdale. Mr. Lonsdale at that time was one of the Trustees. Since then Mr. Frank A. Thompson has been substituted.

By Mr. Skinker: That's right; Mr. Lonsdale died.

By Mr. Edwards: The admission is the same.

By Mr. Skinker: Yes.

By Mr. Edwards: Plaintiff at this time will offer the contract and the letter spoken of and identified here as Plaintiff's Exhibit 4.

By Mr. Skinker: As to that, this contract of the 27th day of March, 1934, between the Illinois Central Railroad and the Frisco Trustees, the defendants Frisco Trustees object for the reason that that contract does not cover the employment of Mr. Haney, does not cover the place where he [fol. 17] was working, and does not cover his employment, and the admissions here so show, that we are excepting to it, that we are not admitting it covers it. We are admitting it

is an accurate copy of the contract, but we do not admit that it covers this case at all or covers our relations with Mr. Haney or Mr. Haney's job.

By Mr. Edwards: This, together with the map described here as Exhibit A, that I want to offer, is referred to in the contract, shows the location of the yard, the location of the switches, and the testimony will connect that up, and show that Mr. Haney's shanty was right here on this map shown here.

By the Court: You will connect it all up.

By Mr. Edwards: That shows he was working on the very switches shown on this map.

By the Court: You will connect the map and the contract up.

By Mr. Edwards: That's right.

By the Court: Objection overruled.

To which ruling of the Court the defendants, and each of them, by their counsel, then and there duly excepted, and still continue to except.

By Mr. Edwards: So that we get the record straight, let the map be marked Plaintiff's Exhibit 4-A.

(At this point a map was marked by the reporter, for the purposes of identification, "Plaintiff's Exhibit 4-A. G. P. B., 2-28-44.")

By Mr. Skinner: I might say at this time that at a later stage of the proceedings the Frisco Trustees expect to show definitely that this contract is not applicable, following which we will make our motion to strike it out.

By the Court: We will cross that bridge when we come to it.

By Mr. Skinner: Very well.

By Mr. Edwards: I offer in connection with Plaintiff's [fol. 18] Exhibit 4, a map labeled—described here as Exhibit 4-A, and described in this contract as Exhibit A.

By the Court: Very well.

By Mr. Edwards: Mr. Hart will read this contract, Plaintiff's Exhibit 4, and letter, Plaintiff's Exhibit 5, to the jury.

Mr. Hart thereupon read said letter marked Plaintiff's Exhibit 5, which is as follows (omitting letterhead and caption of case):

PLAINTIFF'S EXHIBIT 5

Mr. N. Murry Edwards, Attorney, 112 N. 4th St., St. Louis, Mo.

DEAR SIR:

In the trial of the above case in the Circuit Court of the City of St. Louis, Mo., it will be admitted by the defendants, J. M. Kurn, and John G. Lonsdale, Trustees of Frisco Company, as follows:

1. That Frisco passenger train No. 106 which arrived at the Grand Central Station at Memphis, Tenn., on the evening of Dec. 21, 1939, commenced its run at Birmingham, Ala., and was an interstate train.

2. That plaintiff's photostatic copy of the hospital record of St. Joseph Hospital, Memphis, Tenn., dated 12-21-39, in connection with the death of Lyman Haney, is a correct copy of the original of said hospital record kept in the regular course of the hospital's business, and may be used in the trial of the above case for all purposes for which said original records might be used.

3. That on and prior to Dec. 21, 1939, Lyman Elmer Haney was employed by the Illinois Central Railroad Company, or a subsidiary corporation thereof known as the Y&MV Railroad Co., as a switch tender in the railroad yards near the Grand Central Station at Memphis, Tenn. [fol. 19] That his duties included the throwing of switches for said railroad, and also the Frisco and other railroads using the Grand Central Station; and that for his said services the said Frisco Trustees agreed with the Illinois Central Railroad Company to and did reimburse said Railroad Company for two-twelfths (2/12ths) of said Haney's wages.

4. That by written agreement dated the 27th day of March, 1934, by and between the Illinois Central Railroad Company and J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, with print thereof attached marked 'Exhibit A' together with a letter dated May 23, 1934, from W. Atwell, VP&GM, of Illinois Central System to H. L. Worman, Chief Operating Officer, St. Louis-San Francisco Railway Company, St. Louis, Mo., and letter dated May 28, 1934, from H. L.

Worman, Chief Operating Officer for Frisco Trustees, to W. Atwell, VP&GM, Illinois Central System, Chicago, Ill., were in full force and effect on Dec. 21, 1939, and had been since the dates thereof; and that plaintiff's photostatic copies thereof are true and correct copies of the original documents in the office of the Secretary for the Trustees of the Frisco Railroad. Said Trustees, however, deny that the documents referred to in this paragraph apply to the employment of said Lyman Elmer Haney, and deny that said documents apply to or include the location or portion of said railroad yards where said Lyman Elmer Haney received his fatal injuries.

Yours truly, C. H. Skinker, Jr., Attorney for Defendants, Kurn and Lonsdale."

By Mr. Hart: I will read Plaintiff's Exhibit 4, which is the contract referred to. Mr. Hart thereupon read such portions of said contract as were deemed material to the issues.

[fol. 20]

PLAINTIFF'S EXHIBIT 4

So much of the contract, which is very lengthy, has no bearing upon the issues in this case, that instead of encumbering the record with the entire contract, it is briefly summarized as follows, setting forth the portions thereof which are in any wise material to this case:

Said contract is dated May 27, 1934, and is by and between the Illinois Central Railroad Company and the Trustees of St. Louis-San Francisco Railroad Company. The Illinois Central Railroad Company is referred to as the Central Company, and the Trustees of said St. Louis-San Francisco Railway Company, are referred to as the Trustees.

The contract recites the ownership and possession of the station and premises constituting the Terminal by the Central Company.

There are many provisions relating to the use of the Terminal by Frisco trains coming in and out of the City of Memphis, the furnishing of switch engines for them under certain circumstances, the furnishing of necessary tracks and structures by the Central Company, the furnishing of coal and water for engines and water and ice for the passenger trains.

The paragraph designated as 1, found on page 1 of said contract, so far as material to the issues herein, is as follows:

"The Central Company hereby grants to the Trustees the right to use jointly with the Central Company and such other tenants as the Central Company shall have admitted, or may hereafter admit for the use thereof, its aforesaid passenger terminal, consisting of tracks, platforms, that part of its station building devoted to the accommodation of passengers, sales of tickets and checking of baggage, together with concourse and stairways leading to station platforms, joint mail terminal and such other facilities and appurtenances now or hereafter provided by the Central Company for the joint use of its tenant companies in [fol. 21] the conduct and handling of passenger, express and mail business, the lands, premises and buildings embraced within said passenger terminal, being shown in tinted red on the print hereto attached, while the tracks of said passenger terminal are shown by solid red lines in said print, and for convenience all such tracks and facilities shall hereinafter be referred to as 'passenger terminal.'"

Other provisions of the contract deal with furnishing platforms, lockers for use of trustees' employees, furnishing inspection and light repairs under certain circumstances, agreement that employees of Trustees while in and about the passenger terminal shall abide by and conform to rules and regulations of the Central Company, use of a wrecker in case of derailment of trains operated by the Trustees on the terminal and other matters immaterial to the issues herein.

Paragraph 4 of said contract is as follows:

"4. The Trustees agree to pay to the Central Company monthly or within 20 days after receipt of bill the sum of One Dollar and eighty-seven and one-half cents (\$1.87½) for each car in the passenger trains of the Trustees arriving at or departing from said passenger terminal."

Paragraph 8 of the contract, so far as it has any bearing on any of the issues herein, is as follows:

“8. For the purpose of determining liability:

“(a) The Central Company's employees in said passenger terminal while engaged in performing any service for the sole benefit of one of the parties hereto shall be deemed the sole employees of such party.

“(b) The Central Company's employees while engaged in performing or rendering any services solely for the Trustees pursuant to the provisions of the second paragraph of Section 5 hereof, shall be deemed the sole employees of the Trustees.”

[fol. 22] By Mr. Edwards: Now there is a map, marked Plaintiff's Exhibit 4-a.

Plaintiff thereupon offered in evidence said Exhibit 4-a, which is a negative of a photostatic copy of the copy of the map attached to a copy of said contract, Exhibit 4, in the office of the Interstate Commerce Commission.

[Note. Said photostatic copy is not set forth at this point, because it is a negative on which the portions of the map attached to the original of said contract which are tinted in red, as referred to in said contract, show white on said Exhibit 4-a; and said exhibit is identical in all other respects with the duplicate original of map attached to the Frisco Trustees' duplicate original of the contract. A photostatic copy of that map is set forth opposite page 102 of this abstract and is in all respects identical with the map attached to the Frisco Trustees' duplicate original of said contract and Plaintiff's Exhibit 4-a, except that on the photostatic copy set forth opposite said page, the portions tinted red in the original show black, because it is impossible to show the red coloring in a photostatic copy.

The Frisco Trustees will, with permission of the Court, lodge with the clerk of this court their duplicate original of said contract with duplicate original of said plat tinted in red as set forth in the contract so that the court may examine the same if desired.]

By Mr. Edwards: This is a map attached to the contract, a map showing the yards down there, and this direction

is west (indicating); that direction is east (indicating); the station in here is north (indicating); and this is Broadway (indicating), as it is labeled; this is labeled Caroline Street (indicating); this is labeled George Street (indicating), and this is Calhoun Avenue (indicating). I just want to show you those directions; no need of taking a lot of time.

[fol. 23] By Mr. Skinker: Defendant Frisco Trustees at this time moves to strike out Plaintiff's Exhibit 4 and 4-A attached which has just been read to the jury, for the reasons stated in our objection, and for the further reason that there has been no showing whatever on the part of plaintiff that that contract of 1934 applies in any way to the employment of Mr. Haney, which is involved in this case, and for the further reason that any provision in that contract with reference to liability between the Illinois Central and the Frisco Trustees are binding only as to them and create no rights in third parties, such as Mr. Haney, or his personal representative.

By Mr. Gentry: The Illinois Central makes the same motion.

By the Court: Motion denied.

To which ruling of the Court the defendants, and each of them, by their counsel, then and there duly excepted and still continue to except.

By Mr. Edwards: Now, Mr. Hart, will you read this deposition of E. L. Gates first? Read the caption page first to give the jury the date it was taken.

By Mr. Gentry: What is the name of the witness in the deposition?

By Mr. Edwards: Mr. E. L. Gates.

By Mr. Hart: This is in the Circuit Court of the City of St. Louis, the deposition of E. L. Gates—

By Mr. Skinker: What page does that start on?

By Mr. Hart: Page 17. Taken on the 1st day of May, 1941.

By Mr. Gentry: You are offering that in evidence?

By Mr. Edwards: That's right.

By Mr. Gentry: The defendant Illinois Central Railroad objects to the offer of that deposition for the reason that the information that has been given by Mr. Hart, as he read the date, shows it was taken at the time when the [fol. 24] defendant Illinois Central Railroad Company was

not a party to this suit, it had not been made a party to this suit. The record will show it was made a party at a later date. Therefore, the Illinois Central Railroad objects to this deposition, and any evidence in it, as against said Illinois Central Railroad, because Illinois Central Railroad Company was not notified of the taking of it, and had no opportunity to be present—

By Mr. Edwards: We will offer that as against—

By Mr. Gentry: —and was not present.

By Mr. Edwards: We offer that deposition as against defendants J. M. Kurn and Frank A. Thompson, Trustees of the St. Louis-San Francisco Railroad Company, debtor.

By Mr. Gentry: And not as against the Illinois Central Railroad Company?

By Mr. Edwards: That's right.

By Mr. Hart (reading):

Said deposition taken on the 1st day of May, 1941, in Memphis, Tenn., omitting caption and formal parts, is as follows (in narrative form):

E. L. GATES, being duly sworn, deposes and says in behalf of the plaintiff as follows:

Direct examination.

By Mr. Edwards:

My name is E. L. Gates. I live in Memphis, Tenn. I am a dispatcher employed by the Arkansas & Memphis Railway Bridge Terminal Company, and have been so employed since February of 1924. I work at the corner of Kentucky Street and Broadway, going on at 3:00 P. M. and off at 11:00 P. M. My duties are to direct the train movements over the bridge between Kentucky Street and Briark, and handling switches.

I knew Lyman Haney during his lifetime, and had known him for several years. He worked about two blocks [fol. 25] east of where I worked. My duties caused me to communicate with him over the phone in regard to train movements. His hours on duty were about the same as mine. Mr. Haney was a switch tender and my duties were somewhat similar to his. It is a combination job that I have; it is to direct the train movements and handle switches.

On the evening of December 21, 1939, I received a report that Mr. Haney had been injured. I do not remember just when I received it, but it was somewhere near seven o'clock or possibly a little later that evening. I don't recall from whom I got the report nor just where I got the information first. It was to the effect that he had been injured there at the switch just east of Florida street. I went to the place where he was said to have been injured. I don't recall whether I went immediately or not, but it was just a few minutes afterwards. I went to the switch where the Frisco train backs into the Grand Central station off the main track at a point possibly 200 feet east of Florida street. Mr. Haney was lying on the ground near that switch, possibly 15 feet from it. It was the Frisco switch leading from the main line to the Grand Central station where the Frisco train usually backs into Grand Central station.

As I recall, Mr. Haney was immediately north of the switch and I would say from 12 to 15 feet due north from the north rail of the Frisco track, lying on his back with his feet toward the track, his feet were nearest the track, as I recall. I found a mound there near the track, north of the Frisco track and switch. Haney's body when I first arrived, was on top of the mound. Someone, I don't know who, was holding his head up. I didn't examine him to see whether there were any injuries or not, or the extent of the injuries, or where he was injured. There were possibly 7 or 8 persons there when I arrived, just a few employees of the railroads. I am not positive just who [fol. 26] was there. I couldn't say for sure who any of them were, it was in the dark and I was there only a minute or two. I didn't see any blood near the body or near the tracks.

I don't know whether Mr. Haney was lying at that time where he was first found, or not. Someone was squatted down and holding Mr. Haney's head up as I came up there. It didn't appear that either of his arms or legs had been run over by the train.

As I recall it, the switch was still lined in the position that it was in as it had been used by the Frisco train backing into the station. In other words, it had not been closed. A part of Mr. Haney's duty was to open that switch and permit that Frisco train to back in and his next duty would have been, after the Frisco train backed in

north to the station, to reline the switch for the main track, that is, to close the switch. There was a switch light on the switch which shows red for the train when lined for the track for the station, and green for the main track.

The Frisco train had an engine and usually about seven cars, I think. They may have had extra equipment at that time, it being just before Christmas. I was not at that scene more than five minutes at the most and then I went back to my duties at my office. I never saw Haney any more. I possibly passed back and forth there the next day to and from Carolina street, as I take that route by there. I did not stop to examine anything in particular. I may have looked the situation over slightly, but did not make an examination.

That mound north of the tracks near the switch was, I would say, about two feet high, that is, above the rail of the Frisco tracks. I would say it was possibly ten or twelve feet from the mound to the north rail of the Frisco tracks. It was just loose dirt that had been thrown out there until it was built up to the height of possibly two feet, and I would say that the base of it came probably [fol. 27] within ten feet of the north rail. That was down at the level of the ground, and then it slopes back a little to the peak of the mound.

I know nothing more about the case other than that Haney was wearing a white cap and it was new or practically new, had not become soiled; and I looked at the cap and at a point on the back of it there was a dirty spot on the outside of the cap. There were no blood stains, but just a black spot, and I was told later that that corresponded with the location of the injury on the back of his head, a little to the right of the center of the head, and a little lower than the crown of the head. Possibly just a little above the top of the ear. The mark on the cap was about the width of my finger and possibly an inch and a half long. It seemed like it just angled down, not across. I showed the cap to someone there, but don't recall who it was. I did not see any weapon of any kind around there. I don't know whether I saw Haney's lantern or not; there were several men there with lanterns. If I saw it I didn't recognize it as being Haney's. I saw no instrument, pipe or club or anything lying around there. There were no light there and none near there.

There has been lights put up since then right near this spot where Haney was killed. It wasn't there at the time when he was killed. It is near the switch and shines on or near it.

There is another track north of that Frisco track, but it is a track of the Rock Island and the south rail of it is about 20 feet north of the Frisco track. There is a switch on that Rock Island track somewhere back in there, but it is between where Haney was injured and the office back there.

When that Frisco passenger train comes in there, I line the switch where I am; the engine heads up on the main track, and Haney lines the switch at the rear end for them to back in. I line a switch west of there for the same train. [fol. 28] On the day in question I don't recall anything out of the ordinary in the backing of the train. I was on the north side of the Frisco train. The engine went on up beyond my place, west of me, just a short distance. If there is extra equipment it goes on farther west. I don't remember whether it went beyond me that time or not. I would say that, in backing in, the Frisco train would not go more than five miles an hour. I do not know whether there were any doors open on that Frisco train as it backed in. You see the train, all of it, doesn't come up as far as I am; I would see very little of it to the rear of the engine.

Cross-examination.

By Mr. Skinker:

That track north of the Frisco track is, I believe, the property of the N. C. & St. L. and leased by the Rock Island. The N. C. & St. L. uses it some. The mound I spoke of was about midway between those two tracks. I conduct my work in a little room which is an office known as the bridge dispatcher's office, at Kentucky and Broadway. It is west of the wye switch that I spoke of, near which Mr. Haney's body was lying when I went down there. I should say it was possibly 800 feet from that switch stand to my office.

It was getting near Christmas time when they usually have extra equipment on the train. If they had such extra equipment on that would cause the engine to go

considerably west of my place. With the ordinary equipment of about seven cars the engine comes up to just about opposite me or a little beyond, and with this extra equipment it would go on beyond me as far as the extra equipment would reach. My office is in a little wooden building. I think it is only about five feet from the north rail of the track. I could hardly stand in there safely between the track and the office when the train was passing. I have no [fol. 29] distinct recollection of just how many cars passed me at that time. If it develops that there were 12 cars on that train I would think about five passed me going west. The train just pulled by me and then backed up.

In speaking of Mr. Haney's cap, I observed the dark spot on the back of it. As well as I can recall, it was about half an inch wide, or maybe a little wider, and about an inch and a half long. It looked like it might have been at a place about the center of the head, a little to the right and a little below the center of the head, but I would say above the ear. I think it was where something struck it, just what it was I couldn't say, but it was something that came in contact there, in my opinion. The mark was on the outside of the cap and in the back.

I have been in that vicinity since the 28th of February, 1928. During that period of time and including the month of December, 1939, I have observed hoboes, tramps and transients on or about those tracks at night attempting to hop freight trains and get rides out of there. There are many tramps, hoboes and transients seeking rides on trains at all times of the day and night. I would say it occurred almost daily. They were everywhere around there. They were both white and colored. The railroads' special agents patrol the tracks and put them off of the properties when found and off of trains. Arrests are often made; the patrol wagon comes down and takes them in and they are prosecuted there.

Redirect examination.

By Mr. Edwards:

After that Frisco train on the occasion in question started to back towards the east and then towards the north into the station, I don't recall that on this specific occasion I stood and watched it for some distance. It

would not have been my custom to watch it beyond the clearing of my switch. I would not customarily watch it [fol. 30] beyond the point where I could reline my switch to its normal position after the engine backed off of it. I presume that after relining the switch I proceeded to the office. I don't know just exactly what I did or what my next movement was. That office or shanty was immediately north of the track about five feet. There is an east window in that shanty. I don't recall looking out of that window and watching the Frisco train backing. I had no occasion to follow the movement of it into the station.

After I went back into my shanty—I could not say immediately or just how long—I attempted to call Mr. Haney on the telephone and I got no response, and a few minutes later I learned he had been struck and injured and I went down to where he was. As I went down there it was dark. There is a street light right there where I work, on that corner, and there are no more street lights between there and Haney's office. I do not think I saw any of the men standing around Haney when I was 50 feet from there, because it was dark.

Recross-examination.

By Mr. Skinker:

The phone Mr. Haney used was in his shanty down where the I. C. main-line tracks and the Frisco tracks cross each other. Unless he happened to be in there I couldn't talk to him anyway. If he would be out around throwing switches or out away from there I couldn't get him if I called him.

By Mr. Edwards (addressing Mr. Hart): You can continue on. This will be offered against the Frisco solely and not against Mr. Gentry's client.

By Mr. Gentry: It is understood that all these depositions were taken before the Illinois Central was made a party to this suit?

Mr. Edwards: That's right.

[fol. 31] By the Court: Objection will be sustained as against Mr. Gentry's client.

By Mr. Edwards: Offered against the Frisco only.

Mr. Mr. Hart (reading):

WALTER ORA BUNDY, being duly sworn, deposes and says in behalf of the plaintiff as follows:

Direct examination.

By Mr. Edwards:

My name is Walter Ora Bundy. I live in Memphis, Tennessee; I am switchman for the Illinois Central Railroad and have been since February 26, 1926, here in Memphis. On December 21, 1939, my hours at work were from 3 p. m. to 11 p. m. at the depot on a coach engine handling passenger equipment to the coach yard and from the coach yard to the depot. I knew Lyman Haney in his lifetime, by sight, I would say, ten years. I saw him on duty as a switch tender every day in those yards. His duties were ~~not connected or related~~ in any way to mine.

On December 21, 1939, I was in the vicinity of where he was hurt. The accident happened about 7:30 p. m., or something like that. I was on duty in that neighborhood at that time and my foreman was F. L. Russoua. I was in his switching crew helping him. We were coming from the coach yard toward the depot, headed north. I judge we were about 300 or 350 feet from the switch where Haney's body was found. I was east of that switch and the engine was headed north. My next movement would have been to go to the depot. It was necessary to wait until that Frisco train backed in before we went to the depot.

I first learned of Haney's injury from Mr. Claude Bruso who said that Haney was hurt and said he was lying there at the Frisco wye switch. He and I went up there together. No one went with us. When we got to the switch we found Mr. Haney lying on the ground, face down. He was north of the switch and a little to the west of it, probably two or three feet west. His head was pointed south, kind of on an angle. The Frisco track runs east and west at that point. Haney's head was pointed a little south and east and his feet extended northward, kind of on an angle. I would say Haney's head was about six feet from the switch, that is north of it, and a little to the west. His cap was out a little to the right of his head, if I remember right. It was a white cap. I did not examine it carefully and did not notice any marks on it. I did not look

around on the ground to see if there had been any struggle. I didn't see any evidence of it. I did not see any club or pipe or weapon of any kind. I saw a pistol lying under Haney's body. I think Haney was about 5 feet 10 inches in height. I would say his feet were about 10 feet north of the north rail of the Frisco track and extended straight back of him, not doubled under him. We turned him over. Before we turned him over I saw right on the back of his head a gash about two inches long. It was bleeding. I saw no other injury. Mr. Bruso and I were the only ones present when we turned him over. Before we turned him over I did not see his lantern or a pistol. After I turned him over I saw that the pistol and lantern were under his body. The pistol was not in his hand, was just lying there under his body. When we turned him over the pistol came in view. It just appeared there. It indicated it might have slipped out of his pocket, and probably did. I don't know whether the lantern was in his hand or not, it was on the ground, that is all I know. His clothing showed nothing to indicate a struggle.

The Frisco train had just backed east and turned north into the station. I noticed that the switch there by Mr. Haney's body was open. It wasn't lined. Mr. Haney's next duty was to line that switch. It shows red when it is [fol. 33] thrown to back the train around the wye and green when it is lined, as we call it, for the main line. The light is in what we call a lamp that sits on the switch stand. It is a casting of metal and there is a bulb in that cup in there with oil. As I approached I noticed it was red. After that Frisco train backed in, to the best of my knowledge, I would say it was ten minutes before we went up there and found Mr. Haney's body. During that ten minutes I had been waiting for a signal. I was waiting for a signal that Mr. Haney operates over in his shanty. The signal was red and I was waiting for it to change to green. It would have had to be changed by him after he had thrown the switch and gone back to the shanty.

When Bruso came to me on that occasion and reported that Haney had been injured, he said he had found him and he and I went back up there as I have described.

While Bruso and I were there, the first man who came up after us to the scene was Mr. Cowan, I think. He is a switchman who was working on the crew with me. I don't remember whether he came after we had turned Mr.

Haney over, but he did come up in a few minutes after we got there. The two of us didn't remain there very long, not over five minutes, if I remember right. Bruso then went and called the ambulance. We turned Haney around and I raised him up and put his head in my lap, squatted down and put his head in my lap. He was alive but not able to talk. His face was bruised from hitting the ground. I believe the bruise was on the left side of his cheek bone and there were cinders on his face. It appears that the injury to his face was caused by hitting the cinders with his face in falling. I don't suppose it was more than ten or twelve minutes after the ambulance was called until it got there, but I don't know how long it was. I held him in the same position until the ambulance arrived. In turning Haney over, we turned him toward the east, which would be towards his left, and turned him around to the [fol. 34] north and east, turned his head more to the north. There was no one there with Bruso and me when we turned him over and put him in that position. They carried him on a stretcher of some kind from the point where I was holding him out to Florida Street to the ambulance. I noticed he had his watch on. It was a gold watch, was intact and was in the watch pocket in his pants. I did not look for any ring or for his pocket book, and don't know whether he had them or not. When he was taken away, I went back to my crew.

That Frisco train which was backing in from the switch was 12 cars long, I believe. It was longer than usual on account of the Christmas holidays.

I was riding on the front end of my engine, so that when it stopped I was in a position to see that Frisco train backing in, and I could then see that the switch stand where I afterwards found Haney's body was red and I knew it was Haney's switch and his duty to throw the switch. I never had occasion to watch that light because we never come in contact with that switch. I watch the light up over the shanty. That is what we go by. I did not notice that the switch up there by Haney was showing a red light until we went up there.

Cross-examination.

By Mr. Skinker:

There was no evidence of Mr. Haney having been dragged on the ground. I had a good bright electric lantern. I did not look at the ground to see whether or not his body had been dragged. From Haney's appearance he appeared to have fallen right forward. It looked to me like some blunt instrument had struck him and caused him to fall forward.

By Mr. Hart: Now, Your Honor, I am reading from the deposition on page 146, as follows:

By Mr. Edwards: This is offered solely against the defendants, Frisco Trustees.

[fol. 35] By Mr. Gentry: It is admitted all of these depositions you are offering were taken before the Illinois Central Railroad Company was made a party to this suit?

By Mr. Edwards: Yes, sir. I think so, including the doctor's examination, I think they were all taken before.

By Mr. Gentry: Then, of course, my objection is on that ground.

By Mr. Edwards: I am limiting it solely to Mr. Skinker's clients. That may be understood as to all of these depositions.

By Mr. Hart: The deposition reads as follows (in narrative form):

SAM EDWIN ARNOLD, being duly sworn, deposes and says in behalf of the plaintiff as follows:

Direct examination.

By Mr. Edwards:

My name is Sam Edwin Arnold, I live in Memphis, Tenn., am 30 years old, am a switch tender for Illinois Central Railroad Company (often referred to as the I. C. Railroad) and have been a switch tender for 4½ years. In December, 1939, my working hours were from 2:30 p. m. to 10:30 p. m. and I was stationed in Grand Central station. I was working at the south end of the station, at Caroline Street, close to where Lyman Haney was working, but we were not working out of the same shanty. My shanty was farther north from him, one block north. I was putting trains in and out of Grand Central station, handling switches. I have

to go outside of my shanty to handle the switches; there are about 7 or 8 switches to handle. I did not have any lights to work there from the inside of the shanty.

I recall the night when Haney was injured. It was about 7:15 p. m. Mr. Brusco told me. Right after Brusco reported to me about Haney's injury, I went over to the shanty where Haney worked, to throw the board to let the I. C. train in, [fol. 36] but the shanty was locked and I couldn't get in. I then came back over my job and waited until the board went green and let an I. C. train into the Grand Central station.

About 10 or 15 minutes after Brusco had reported to me that Haney had been injured, I went to where Haney was lying. He was laying in Mr. Bundy's arms. When I got there Bundy was holding him up. Bundy was just kind of squatted down on the ground and Haney was laying over on his arm. I just came up and looked down and saw him and turned around and walked down on my job because I was pretty busy at that time of the night. I had to get back on my job. Haney was north of the Frisco switch when I saw him. His body was about 8 feet from the track. I don't remember how he was lying in Bundy's arms. I saw evidence where he had bled on the ground about 8 or 10 feet from the switch. That was close to where Bundy was holding his head, I would say it was a foot or two away, and between Haney's head and the Frisco track. I think Haney's body was about straight north of the Frisco switch. I saw a hole that was knocked in the back part of his head. I didn't see any injury to his face. The only injury I saw was to the back of his head. It looked like he had bled from his head. I would say I remained there about five minutes where Bundy was holding Haney's head, and he was still holding it when I left. The Frisco switch was open at that time and the light was red.

I do duties similar to that of Haney and I knew his duty was to throw this switch and open it so that the Frisco train could back in and his next duty would be to close the switch after the train had backed in. I was south of the shanty where the Frisco train backed in. It was about a 9 or 10 car train consisting of sleeping cars, day coaches, mail cars and baggage cars. It was traveling about 7 or 8 miles an hour, I guess. It stopped on the way because a switch engine had blocked it. I would say that was a

[fol. 37] couple of hundred feet from the switch that Haney had opened. I would say that the back end of the train was about 200 feet north of where Haney had thrown the switch when I gave the signal to stop. The train was standing there 3 or 4 minutes and then I gave a signal for it to go on. I gave the signal to the conductor on the rear of the Frisco train. The I. C. train was interfering so the Frisco couldn't get in until the I. C. got in the clear. That train was going south on the I. C. main line. The Frisco was backing in off of its main line around a wye coming onto the I. C. track.

From my shanty to where Haney's body was found was, I would say, about 300 feet.

I closed the Frisco switch after the ambulance had come down and got Haney. I would say I closed that switch about 30 or 40 minutes after Haney was found. No trains had passed over that switch after Haney was hurt and before I closed the switch.

Cross-examination.

By Mr. Skinker:

I did not make any special effort to count the cars in that Frisco train. I am just making an estimate.

By Mr. Edwards: Now the deposition of D. M. Stubbs, starting on page 211, which we next offer in evidence, solely against the Frisco defendant, Trustees, as follows:

DENMAN M. STUBBS, being duly sworn, deposes and says in behalf of the plaintiff as follows:

My name is D. M. Stubbs. I live in Birmingham, Ala., I am a passenger brakeman on the Frisco and am also described as a rear flagman and have held that position for 35 years. I was acting as rear brakeman or flagman on the passenger train No. 106 from Birmingham, Ala., to Memphis [fol. 38] this, on December 21, 1939. The train was due in Memphis about 6:50 p. m., but did not arrive there until about 7:30 p. m. We had 12 cars in the train, as I remember now, four of them were Pullman cars, three were day coaches and the rest were baggage and mail and express. We had one mail car and I think there were three express cars that

day. We had two extra cars, as I recall it that day, 12 altogether, and of course the engine and tender. The engine was one of our heavy mountain type engines, or, rather, Pacific type, of the 1500 class.

When we arrived at the cross-over before we backed in the station at Memphis, our train stopped at the crossing before we pulled on down, preparatory to backing into the station. I got off just before the train stopped at this regular crossing and proceeded up the I. C. tracks to get into position to flag the train back over these three or four I. C. tracks which back over into the station. I did not know Haney. I had seen him several times but didn't know him personally or know his name. On that occasion it was dark and I couldn't tell who it was, but I saw what I figured was the switch tender's light as he came over from the shanty toward the rear end of the train just below the crossover. I had dropped off some time before that. When I dropped off I intended to go back up and line up these I. C. tracks, to stop anything that might be going over the crossing, to make sure our train had safe passage to go back in there. I have a red and white lantern to stop any other trains which might go over the crossing while we were backing in there. I dropped off practically a train length east of that switch where the Frisco train backs in, which would be practically a thousand feet, I judge. The train went out of my sight and I could not see the rear end of it. I judge it was about 5 or 6 minutes before I swung onto that train again, because I had to stop the train on the crossing. I had to stop my conductor when he started backing down when he got in sight, coming around the curve. I then signed him down and gave him a signal to stop, because there was another train coming over the crossing, blocking us out of the station. My conductor was on the rear end of the Frisco train. He was G. W. Creagh. I judge the rear end of the train was about three car lengths from me when I gave Creagh the signal. It had then started backing into the station.

The last I saw of the man that I took to be Haney, he looked like he was going to get on the rear end of our train and ride on down to the switch which was west of his shanty something like 250 feet. I did not see whether he did that or not and I did not see what became of him. When that train commenced backing into the switch, I was

more than 1000 feet away from it and could not see it or the switch tender at that time. I could not see anything of it; there was this Stratton-Warren building sticking out on the corner, and it obstructs the view until the train backs around about a half a length after it starts. After the rear end got around that building I saw it. That Frisco train was about 150 feet north of the Frisco main line when I could first see it. I could see the rear end when it came around that building, and this engine was coming around the other track and I had to sign my conductor down, give him a signal to stop, which he did. We had to wait there for the other train to get out of the way before we backed in. We must have waited something like two or three minutes or maybe a little more. I guess the rear end of the train was about 150 feet north of the Frisco tracks when it stopped. Then it backed up again and went on into the station. I swung onto it as it went in. I stayed on the ground until it started, and then swung on the rear car. It usually runs an average of 8 or 10 miles an hour.

I think the mail car was coupled onto the tender. There is where it was usually carried.

I heard about Mr. Haney's injury the following morning. [fol. 40] I did not hear about it that evening. I heard he was seriously injured and they thought somebody robbed him, took his purse. Several at the station told me that when I went down to go to work. They asked me if I knew anything about it and I said I did not. Nobody told me they thought something sticking out of the train hit him.

When that train backs into the station it usually stays there about 25 minutes and then goes out. That was the end of my run, so I do not know how long it stayed that night. When it leaves Memphis, it goes on to Kansas City, Mo.

Cross-examination.

By Mr. Skinker:

The Frisco main line tracks at that place run, in a general way, east and west so the train was headed west as it came along there moving forward. In a general way, the Illinois Central tracks there run north and south. In order to get into the station Frisco train 106 had to head

west over the Illinois Central crossing and go far enough west for the back end of it to clear the wye switch and then back into the wye switch and then northeastwardly on toward the station. I dropped off of the Frisco and went up north on the Illinois Central tracks to protect my train as an extra precaution. On this particular evening I stopped an Illinois Central train coming out of there that blocked us. It was a yard engine, if I remember right. There could have been a collision if I hadn't done that. The back end of the Frisco train was pretty well lighted up. I saw the conductor on that platform that night and I joined him when I got on there. He acted on my signal when I signaled him to stop. When I signaled to him to stop, the Frisco engine had already backed beyond the switch stand so that it should have been beyond the switch and should have cleared the switch and no part of the train would have been left on the main line.

[fol. 41] Redirect examination.

By Mr. Edwards:

When I swung onto the train it had just started moving good, something like 8 miles an hour.

JOHN JOSEPH DRASHMAN, being duly sworn, on the part of the plaintiff testified as follows:

Direct examination.

By Mr. Edwards:

My name is John Joseph Drashman. I live in Memphis, Tennessee; am employed by the Frisco Railroad, that is, the Frisco Trustees, the defendants in this case. I have been with the railroad since forty years ago on the 2nd of February. My title is coach foreman. I have charge of the passenger equipment, supervising repairs, anything in connection with the passenger cars. There are two places where I perform my duties; they are the Grand Central Station and the Yale yards, both in Memphis. I go anywhere in the yards where a Frisco train would be stationed. I mean passenger trains. That has been my duty ever since I have been employed there. I have 86 men

working for me. They do coach cleaning, coach repairing, inspecting, and just maintain the passenger equipment. That includes mail cars, for they are considered passenger cars. It has nothing to do with engines and tenders. In December, 1939, I didn't have any specified hours for work. I am on a monthly salary and along that time I was working anywhere from 18 to 20 hours a day. I showed up around the Grand Central Station about 6:30 A. M. and left the station about 8:30 A. M. to go into the Yale yards; then I come back down to the station again around 6 o'clock in the evening. Whenever there is any rush hour in extra work I stay there until it is all completed. Around Christmas time I generally stay there until the last train has departed, which is around 11 o'clock, probably later.

I did not know Lyman Elmer Haney personally.

[fol. 42] On December 21, 1939, while I was on duty, I received a report that Haney had been injured. I was then over around that gate, between tracks 4 and 5, if I remember right.

Plaintiff's Exhibit 4-a, a map, is a correct drawing of the lay of the station and the yards and the switch yards and tracks at Memphis at the Grand Central Station. I have seen maps like that before. I take a pen and make a cross mark on the map where Haney's shanty was located. It was where I have just made that cross. It is north of the Frisco main line that runs east and west. There are several tracks in there; that is what is called the Illinois Central tracks into the depot. The right side of the map is north. The light colored portion in here is the same portion that is red tint in the original map. I don't know anything about these tracks, that is not my job. I couldn't tell you where the switch was from the shanty; I couldn't point it out on the map. The switch, where the body was found, was west of the shanty. I should say it is around 150 feet from the shanty, kind of northwest from it. I do not know who Haney worked for. I had seen him working around there but did not know his name. I didn't pay any attention to how long I saw him around there. I learned of Haney's injury about 7:40 p. m. I should judge I was then about a half a mile from where he was injured. Our superintendent of terminals came through the gate and wanted me to go with him, and that is what I did. I went straight down the track south

from where I was standing. Haney's body had been moved when we got there. I didn't see the body. I remember when my deposition was taken in this case. I remember testifying in my deposition that I went right down there after I heard that there was an accident. I don't remember saying that I was up around the station master's office, but I imagine that is so. I don't remember testifying that I saw [fol. 43] Haney's body there. I don't remember the date of my deposition. I do not remember testifying in my deposition that I didn't know how far Haney's body was from the Frisco tracks, as I didn't measure it.

I did not see the body.

I do not remember testifying that my best judgment would be that it was about six feet from the tracks. I do not remember testifying that I thought the whole body was about six feet from the track. I did not testify to that. The only thing I testified to is as to the location where his body was supposed to have been. I do not remember testifying that he was lying on his face with his back up and his head faced west. I testified Mr. Young, our superintendent of the terminals, and I went down together. That is true. I remember testifying in my deposition that there were several parties there, but I didn't know who they were; that I thought the I. C. switch engine foreman, Brusio, was there and that I thought there were several of the city plain-clothes men there. I remember testifying to that and that is true.

By Mr. Skinker: If the Court please, I don't think the attorney has the right to go ahead with the question and answer all of the way through the deposition. The witness has testified that he has no recollection now of seeing Mr. Haney's body down there, and that he does not recall testifying to that effect. Now, that is all there is to it. There is no occasion to go clear through the deposition.

By Mr. Edwards: But I have a right to plead surprise in this case. This deposition was given by this man, filed like all of the other depositions. I have a right to question this witness on surprise. They have asked me to put him on the stand.

By Mr. Gentry: If the Court please, we did not ask him to put him on the witness stand.

[fol. 44] By Mr. Edwards: You objected to me reading his deposition.

By Mr. Gentry: But don't misquote the statement. We did not ask you to put him on the stand. You have no reason to say that.

By Mr. Edwards: And I am pleading surprise when a man denies his deposition.

By Mr. Skinker: He has not denied his deposition. He says he does not recall seeing the body, and he does not recall testifying about it. Now, that is settled and determined, and that is no reason why he can go clear on through the deposition. I think he could proceed to continue his regular examination of the witness.

By Mr. Edwards: I am going to this particular point, about what happened at the body. When he was testifying today I asked him if he remembered it and he said no. Now, I have a right to refresh his memory.

By the Court: Are you pleading surprise and considering this man as a hostile witness?

By Mr. Edwards: I certainly am. He is still working for the railroad, and I am surprised to have him deny those statements made in the deposition. Some of it he says he remembers, and some he says he does not remember. Now, I am entitled to know what he does remember.

By the Court: Objection overruled.

(To which ruling of the Court, the defendants, and each of them, by Counsel, then and there duly excepted at the time, and still continued to except.)

By Mr. Skinker: Do you propose to go clear through the entire deposition, the entire examination?

By Mr. Edwards: I propose to conduct my case in the best way in an effort to find out what he is going to deny, and what he does say he did, so I can show what this witness now says he knows about it. That is what I propose to do, try my own case in my own way.

[fol. 45] By Mr. Skinker: May I make an objection so that I get it clear?

By the Court: Yes, sir.

By Mr. Skinker: We believe the law to be, and we take the position, when they put this witness on the stand, they have a right to ask him questions as to the facts. And if he says certain facts as he remembers them are a certain way, then they have a right to ask him if he did not testify to the contrary in his deposition, and they have a right

later to read his deposition for impeachment purposes if they want to. But we insist because he does not remember of seeing the man there that they do not have a right to go clear on through the entire deposition question and answer, and ask him if this question was asked and this answer made.

By Mr. Edwards: I am asking him concerning right around Haney's body. It is a funny thing he remembers some things, and does not remember other things. I am entitled to know what he remembers when he made this examination two years ago.

By Mr. Gentry: I submit the proper way is to ask him whatever question he wants to ask. If he wants to develop any evidence from the witness he has a right to ask the witness as to those facts. And when the witness makes an answer, if Mr. Edwards claims it is contrary to what he testified before, then he has a right to read that question and answer from the deposition. We think the orderly way to do is to ask this witness to tell what he remembers about certain facts.

By Mr. Edwards: That is exactly what I am doing.

By Mr. Gentry: No, you are reading from the deposition.

By Mr. Edwards: Now, Your Honor please, we have gone over this a number of times, this witness has shown his hostility, he says he still works for the company, and some things he says that he remembers, and others he does not remember. I am certainly entitled to know the truth.

[fol. 46] By Mr. Gentry: All that is, we are taking time reading from the deposition.

By Mr. Skinker: We renew our objection.

By Mr. Edwards: I will do this, I will try to find out before I go on with this. I want to find out what happened around this body there. I am certain- entitled to that. I might do this.

To Witness:

Q. Mr. Drashman, who have you been talking to about this since this deposition was given?

A. Well, I have not been talking to anyone. I had forgotten about the case altogether. And I am trying to tell you that I do not remember ever stating that I saw the body, which I did not. I did tell you that I saw the location where the body was supposed to have been.

By Mr. Edwards: Well, you have told me that, these questions that I have read to you, that you do not remember, and now you say that you did not hear about this case, or have not talked to anybody about it since the time this deposition was given, until recently?

A. Until the last day or two, yesterday to be exact.

Q. Recently who have you talked to about this case?

A. Well, Mr. Skinker had me in his office yesterday.

Q. Did you go over the case with him yesterday?

A. Not all of the way through, no, sir.

Q. Did you discuss what you were going to testify to here in Court?

A. No, sir; he told me he wanted me to get up and tell the truth just to the best of my recollection, and that is what I am trying to do.

Q. Is that all he told you?

A. Yes, sir.

Q. And that is all you and he talked about?

A. Yes, sir.

I did not testify in my deposition that I saw what looked to me like a hole knocked in the back of Haney's head, like someone had struck him with a blunt instrument of some kind. I did not make any such statement. I do not remember testifying that his head looked like it had a caved-in place as if someone had hit him with a club or [fol. 47] something. I did not say that it could have been a round pipe that hit him, nor that he was not turned over while I was there, nor that I remained there about three minutes. I remember testifying that there was a spot of blood there about six inches across and that is true. I imagine I did say in my deposition that it was south of the rail and I didn't know how close to the switch. I don't remember that part of it. I testified that it was after his body was removed that I saw the blood. I don't remember saying that I did not see any blood while the body was there except on his head. I did testify that Mr. Young and I went there the same night after the body was removed and that Mr. Young and I went down there together. I testified that there was a pile of dirt piled up there which I imagine was about two feet above the rail and extended along there several feet both east and west of the tracks. I did not testify that I came back again after I had been to the scene of the accident. I remember telling you that

I had gone back and inspected the equipment after I left the scene of the accident but I did not tell you that I saw the body. I never did see the body, even up to this time. What they have in this deposition about my seeing the body is not true and I swear I did not so testify. I never did tell you I saw the body at any time.

(At this time a recess was taken until 2 o'clock P. M. on Tuesday, the 29th day of February, 1944, at which time, all being present, the further following proceedings were had in the case at bar, to-wit:)

By the Court: You may proceed, gentlemen.

By Mr. Skinker: Let the record show, Your Honor, that this is in the absence of the jury.

By the Court: Yes, sir; it may so show.

By Mr. Skinker: Plaintiff's attorney, Mr. Edwards, in examining the witness, Drashman, in regard to what said witness stated in his deposition in this case has reached [fol. 48] a point in said deposition approximately at the top of page 199 of said deposition. And the defendants want to read page 199 and approximately the first half of page 200, because they deal with matters which should not be read to the jury. And after reading said portion of the deposition we will then state to Your Honor our objections to the reading of such questions and answers in the presence of the jury. Now, beginning at the top of page 199 of said depositions, being part of the deposition of Witness Drashman, I will read as follows:

"Q. You examined the fireman's side very close?

A. Yes.

Q. And you didn't examine the engineer's side quite so close?

A. Not so close, no.

Q. What was that difference?

A. Well, because someone said that they thought that train No. 106 backing into Grand Central Station is what struck this man.

Q. You mean Haney?

A. Yes, sir.

Q. That is, someone told you that at the scene of the accident?

A. No, he didn't see the accident; I heard someone say that is what happened.

Mr. Skinker: Just a moment. We object to that and ask it be stricken out as purely hearsay.

A. That is all—I didn't get who it was.

— By Mr. Edwards:

Q. All right, who told you that, and when?

A. I don't know who it was; I just heard them talking around there.

Q. Who did you hear talk and where?

A. I don't know who it was, down where Haney's body was laying on the ground.

Q. Where Haney's body was laying on the ground?

A. Yes, sir.

Q. That is where you heard this statement made?

A. Yes, sir.

Q. Somebody said they thought something sticking out [fol. 49] on the train hit him; is that right?

A. That is what I heard there.

Q. That is what you heard there?

Mr. Skinker: Just a moment. I want to object to that as hearsay and improper and may it go to all similar questions?

By Mr. Edwards: Yes.

By Mr. Edwards:

Q. That was down there when you first went down and saw Haney's body?

A. Yes.

Q. You heard someone there where the body was saying that they thought something sticking out on the train hit him; is that right?

A. That is right."

By Mr. Skinker: That is the end of the quote. Now, defendants object to Plaintiff's Counsel repeating the questions and answers which have just been read from the deposition, in the hearing of the jury—that is, we object to them being read in the hearing of the jury, for the reason that they deal absolutely with hearsay, deal with what the witness Drashman is supposed to have heard said by someone down near the scene of the accident; for the further reason that what anyone down near the scene of the accident said, as to what they thought had struck

Mr. Hancy, or injured him, would be a mere conclusion on the part of such person, and would not be competent in evidence, even if such person were present to testify. And this evidence here of what the witness Drashman heard someone down at the scene of the accident, say, as to what he thought caused the accident, is purely hearsay, and is of a highly prejudicial character. And such questions and answers for the reasons stated should not be read to the jury—read in the presence of the jury, and we ask now that the Court rule that said questions and answers may not be read in the presence of the jury, and to rule out such matter as purely hearsay, improper, and incompetent, for the reasons stated.

[fol. 50] By Mr. Gentry: The defendant Illinois Central joins in the objection for all of the reasons stated herein, and I think it would be clearer if Mr. Edwards would say as I now ask him, if it is his intention to read the part of the deposition that has been read by Mr. Skinker, as he is examining this witness. If he has no intention of reading it, we are wasting our time, and if he says he intends to read it, it is the time to rule on it.

By Mr. Edwards: Now, Mr. Gentry, I intend to question this witness as I have been questioning him, and I told Mr. Skinker when I was trying to make the offer, to let me finish my offer—my examination. That is when I was interrupted, when we went to dinner. I want to make my record in a proper way. I have showed that I have been surprised by the testimony of this witness. Under the rule I am required to point out these things to this witness, and see if he said them. If he says he said them, I want to make my record in the proper way. After I have made my record it will probably lead up to these others. And the way the witness has been going, unless he changes his tactics and says he testified as the deposition shows, I then will not have to read them, Your Honor.

By Mr. Skinker: But he has been reading the questions and answers first, and then asking him if he testified to them.

By Mr. Edwards: No, sir; I asked this witness first.

By Mr. Gentry: That is what I have insisted that you should do.

By Mr. Edwards: I took this deposition and asked him the questions, and then I will read from the deposition.

By Mr. Gentry: And then you went way beyond that.

By Mr. Edwards: No, sir; I stayed around the body, and he would pick out a question and answer and say, "I said this, but I didn't say the one following it," and I have had to show these.

[fol. 51] By Mr. Gentry: If by any chance I get a chance to state my ground, I would like to state it, if it is agreeable to Court and Counsel.

By the Court: It is agreeable to the Court right now, it has been right along.

By Mr. Gentry: Not only did Mr. Edwards show the witness his deposition first, but in a number of instances he read the questions and answers first, and then asked him if he said those things. Now, if he proposes to do that same thing now, it will be too late to make any objection that would do us any good, if he is allowed to read the things before we make the objection. Therefore, we object to his reading them, and I ask him if he intends to read them. And if he intends to ask the witness if he said these things, and then the witness denies it, then I can make an objection. But if, on the other hand, he reads the things first, and I do not object now, then I will be too late.

By Mr. Edwards: Don't you recall I asked this witness about going down there and seeing the body, and the witness started denying that he had seen it?

By Mr. Gentry: Yes, sir.

By Mr. Edwards: And all of the rest was gathered right around, how he had seen him, about the injury on his face, and on the back of his head, and he said at all times that he was laying with his face down. We have gotten down to that question, and all I want to do is to make my case in the proper way.

By Mr. Gentry: I object to his reading it.

By the Court: Can't it be agreed that you do that for impeachment?

By Mr. Edwards: You have both in this case, the question of impeachment and *res gestae*. My client is entitled to both benefits. I don't want these gentlemen to try to narrow me down and take away my rights in the trial.

[fol. 52] By Mr. Gentry: In either event, he ought to ask the question first.

By Mr. Edwards: I told you I wanted to lay my foundation and ask some questions first.

By Mr. Gentry: I don't like the funny way you lay foundations.

By Mr. Skinker: May I make a suggestion?

By the Court: Yes, sir.

By Mr. Edwards: If you start to object, I will let you go ahead and make your record, make your record at any time.

By Mr. Gentry: That will be your record if you do that.

By the Court: Now, Mr. Skinker, what do you have to say?

By Mr. Skinker: If this witness were asked the question by Mr. Edwards, "Did you hear someone down around the scene of the accident make a statement as to how they thought the accident happened," or "What hit or struck that man," such questions we have no objection to him asking whatever. Such question would call for purely hearsay testimony, and we could object to it on that ground, and Your Honor could rule, and I think no doubt would sustain it. Now, the plaintiff in this proceeding is attempting to do by indirection what he cannot do directly. In other words, he is about—I think it is obvious—to read to the Jury these questions and answers which I have just read to Your Honor, and dictated into the record, in order to get the poison of the hearsay before the minds of the Jurors. And we say he has no right to do that. And we think Your Honor's ruling should be that he must ask the question of the witness, "Did you hear any statement made by witnesses at the scene of the accident with reference to how the accident happened," or how they thought the accident happened, and then our objection would follow to that as purely hearsay. And we think it would be sustained, but it could be ruled upon, and we could proceed [fol. 53] in an orderly way, and that is the way we ask it be done, and that is the purpose of our objecting to this now, so that Your Honor can see our position, and also see the position we will be in if all of this is read to the Jury, and the poison goes before them, and this testimony goes in, because then, no matter what Your Honor rules, it is in, and the poison is there. That is why we ask Your Honor at this time to make a ruling that he must proceed as I have indicated, to ask the question of the witness as to whether he heard any statements, not what they were, but whether he heard any statements, and then to let us

put our objection in, and not to proceed by reading the portions of the deposition.

By Mr. Edwards: Now, you see, Your Honor, they come back to the same thing. They want to instruct me how to try this case in a certain way. They say they are not dictating, but they are asking Your Honor to tell me that I have to ask a certain question in a certain way. I have a right to lay the foundation to question this witness according to my own ideas, and according to the rules of evidence. As to Mr. Skinker, I don't want to shut him or Mr. Gentry from making any objection, but I want to make my record proper, and I think I have a right to try this case in my own way. I don't think you gentlemen should ask the Court to instruct me how to ask a question. I may not ask it just right, but then I have my own ideas about it.

By Mr. Gentry: We are asking the Court to tell him how not to do it.

By Mr. Edwards: That is not only improper, but I have never asked His Honor to instruct you gentlemen how to try your case. You do that in your own way, and I will try it in my own way. That is all I want to do.

By Mr. Gentry: Have you no reference to the rules of evidence at all?

[fol. 54] By Mr. Edwards: That is according to the last controlling decision of the Supreme Court.

By Mr. Gentry: I haven't seen it.

By Mr. Edwards: If you read the famous Pulitzer case, I read it at noon.

By Mr. Gentry: It don't lay that rule down.

By Mr. Edwards: I am proceeding exactly according to that case, according to the Supreme Court's last ruling.

By the Court: Well, this Court is inclined to follow the rulings of the Supreme Court at all times.

By Mr. Edwards: That is all I want to do.

By Mr. Gentry: You had better get that case and let us look at it. I don't think that case announces that you can go at it that way.

By Mr. Edwards: Your Honor, I will call to your attention that Judge Cave in the Pulitzer vs. Chapman case had testified that the administratrix had discussed the making of a will with him several times. He testified in the deposition Mr. Chapman, the man accused of things, was present. And then later on at the trial, this witness said he

was not present, and the Supreme Court said that Judge Cave's statements should be read, it was up to the Jury to decide which one was true, whether he was there or was not there. And they sent that case to the Jury solely on that statement. I happen to have another case, *Loehr vs. Stark*, a case that they beat me on, just about a year before, and they said I showed no circumstantial evidence of undue influence, but they said in the *Chapman* case about a year later that there was some evidence, and it was that evidence where Judge Cave had sworn in the deposition that the man was present, and he swore at the trial he was not present.

By Mr. Gentry: This man has not sworn at all on this trial.

By Mr. Edwards: He has sworn he was down there, and he saw this man lying on his face. He testified to what happened there—

[fol. 55] By Mr. Gentry: (Interrupting) Judge Cave was asked certain questions and answers given by him, was asked about the questions and answers. And then to impeach him, the deposition that he had given previously was read. Now, that is what we say is right. He proposes to read the deposition first, and then say to him—then show it to him—and say to him, "Did you say that?" Ask the man the facts, let him testify, and then if you can impeach him, all right.

By Mr. Edwards: You know I first asked this man about seeing this body and everything, and he said he did not see the body, and then I was compelled to read the deposition to him, that is the way I am proceeding.

By Mr. Gentry: You have not asked what people said down there.

By Mr. Edwards: Well, you gentlemen blocked me on that, or I would have asked him.

By the Court: Well, we will proceed according to the latest rulings of the Supreme Court: They don't always agree with me, but I always bow to them for some reason. Objection overruled.

To which ruling of the Court, the defendants, and each of them, by Counsel then and there duly excepted at the time, and still continue to except.

By Mr. Skinker: May it be understood that we will not have to continually renew this objection as to this character of hearsay testimony, because there is question after question about it, and I do not think it is necessary to renew this objection?

By Mr. Gentry: I don't like to interrupt you every time, but I would have to interrupt you on almost every question.

By Mr. Skinker: I think if Your Honor allows this line of objection to be considered in, it will not be necessary for us to repeat the objection.

[fol. 56] By the Court: Whichever way you gentlemen want. If you can agree on that, all right, if you can't we will rule on each question as it is asked. Bring the Jury down, Mr. Sheriff.

(The further following proceedings were then had in the presence of the Jury:)

By Mr. Edwards: (To Witness Drashman) Now, did you examine this train, Frisco passenger train Number 106 that came in to the station at Memphis there on the evening of December 21st, 1939, after that train came in?

A. Yes, sir; I made an examination of it.

Q. Did you examine both sides of the train?

A. Yes, sir.

Q. Did you examine that which would be the fireman's side of that train?

A. Yes, sir.

Q. I say, which would be the fireman's, that would be the left side, wouldn't it?

A. Yes, sir.

Q. Did you examine the engineer's side of that passenger train?

A. I made an inspection of that train first, and then I went over on the right side, and the car inspector, Armand, he was making an inspection of what we call the right side, and then he and I went back on the left side again, yes.

Q. Did you particularly examine the left side of that train?

A. No more than I did the right.

Q. Well, I will call your attention to your deposition about that. Listen to these questions and answers, Mr. Drashman.

"Q. Well, you spoke of examining this train, did you examine the right side, the engineer's side?

A. Yes, I went around both sides, but particularly on the engineer's—on the—it was on the fireman's side.

Q. Oh, you particularly examined the fireman's side?

A. Yes."

Do you remember answering those questions in that manner in your deposition?

A. Yes, you asked me if I made an inspection, and I told you yes.

[fol. 57] Q. Well, I have just read to you the last question and answer, "Oh, you particularly examined the fireman's side?

A. Yes".

Don't you recall testifying to that?

A. I remember telling you I made an inspection of it, yes sir.

Q. Don't you remember telling me that you particularly examined the fireman's side?

A. No sir; I do not.

Q. Well, what I have just read to you, did you so testify in that deposition?

A. I don't remember it if I did.

Q. You may have testified to it?

A. I may have.

Q. Well, is it true, what I have just read to you?

A. That I made an inspection of the train, yes, sir.

Q. What I have read to you, is that true?

A. No.

Q. All right. Now, the next question along that same line: "Q. Now, what do you mean particularly examined the fireman's side—did you examine that better than you did the engineer's side? A. I looked at that very close."

Did you so testify?

A. Yes, sir; I did.

Q. And that is true, is it?

A. Yes, that is it.

Q. Why did you examine one side closer than the other?

A. Do you want me to answer that?

Q. Yes, sir.

By Mr. Skinker: We object to his answering that question, if it deals with any hearsay testimony, or of any matters he may have heard, particularly if it deal with

any party's expression of opinion as to what their thought might be as to how the accident occurred.

By Mr. Edwards: I can't anticipate what this witness will say, Mr. Skinker.

By Mr. Skinker: Let me finish; and that such testimony would be hearsay and incompetent, and we therefore object to his going into that question at all.

By Mr. Gentry: I object to that question because it is very evident in view of what is contained in the deposition of this witness to which Your Honor's attention has been called, and which Mr. Edwards now has in his hand [fol. 58] and is endeavoring to bring out from this witness, the same matter in the deposition, to which we have objected, and therefore I object to it because it is evident he is asking the question to get his reason and bring in this hearsay testimony as the reason.

By Mr. Edwards: I don't think that is evident. I don't think you can anticipate what this witness will say, unless you know.

By Mr. Skinker: May I join in Mr. Gentry's objection, and include that in my own?

By the Court: Yes sir; objection overruled.

To which ruling of the Court, the defendants, and each of them, by Counsel, then and there duly excepted at the time, and still continue to except.

(Question read by Reporter: Why did you examine one side closer than the other?)

A. Because I was told by one of the switchmen, I believe, if I remember right, that this man was supposed to have been struck by something protruding on the side of this train.

By Mr. Skinker: Now, we object to that answer, and ask that it be stricken, because it is purely hearsay, and further, because it is not identified as to the person who is supposed to have made the statement, and it deals with an expression or a conclusion on the part of the person who made the statement. There is no showing that the person who made the statement was present or saw what happened. The person who made the statement would be invading the province of the Jury in stating a conclusion of his own, in making the statement, and the answer is

wholly improper, and the hearsay testimony should be stricken out.

By Mr. Gentry: We also object to it for the same reason, and ask that it be stricken.

By Mr. Edwards: I want to ask this witness where he got that information.

[fol. 59] By the Witness: Your Honor, could I explain?

By the Court: No, just answer the questions.

By Mr. Skinker: You are overruling my objection?

By the Court: No, are you through?

By Mr. Edwards: I want to find out where he got that.

By the Court: Are you through with that particular question?

By Mr. Edwards: No sir; I want to pursue that some more: (To Witness) I take it that it was a railroad employe, a brakeman or switchman, is that it, said that?

A. A switchman, I think.

Q. And where did he make that statement to you?

A. Out there on the ground where this man was supposed to have been struck.

Q. Haney?

A. Yes, sir.

Q. Was that when you went down there to where this switch was that Haney had thrown to let the Frisco train in at that time?

A. It was down there in that location, yes, sir.

Q. It was down there at the time you first went down there to investigate when you heard that Haney was hurt?

A. I didn't go down there but one time, but that was the time, yes, sir.

Q. And is that the time?

A. Yes, sir.

Q. Was it made down there at the switch which Haney threw to let this Frisco train in?

A. No, sir; it wasn't at the switch, it was in that location around there, see?

Q. Well now, do you know who this switchman was?

A. I do not.

Q. Could he have been a switchman for the Frisco Railroad?

A. No, sir; I think it was the Illinois Central man, if I remember right, the I. C. man.

Q. When you say 'I. C.', do you mean the Illinois Central Railroad?

A. The Illinois Central Railroad, yes, sir.

Q. I will ask one more question, and then you make [fol. 60] your foundation. Wasn't this statement made, that you have just stated, down there when you went down there and saw Haney's body lying there at the switch, isn't that true?

A. No, sir.

By Mr. Edwards: Then, Your Honor please, I will ask to read this part of the deposition. Now, if you want to make an objection to the reading of it—

By Mr. Skinker: (Interrupting) I want to move that the testimony of this witness as to what he heard someone, switchman or other person, say about how he thought that Haney got injured, be stricken out as purely hearsay.

By Mr. Gentry: I make the same motion for my client.

By the Court: Motion denied.

To which ruling of the Court, the defendant, and each of them, by Counsel, then and there duly excepted at the time, and still continue to except.

By Mr. Edwards: Now, I will ask you—Pages 199—if you do not recall testifying to this in your deposition?

By Mr. Gentry: Now, I object to his reading that portion of the deposition. It is very apparent he is starting to read the very part to which we objected before the jurors were brought in.

By Mr. Edwards: That is the part. I understood we would make the record. We have gone over the particular points of law, and I want to make the offer.

By Mr. Gentry: I want to renew my objection to it, for the reasons stated.

By Mr. Skinker: The Defendant, Frisco, renews its objection for the reasons already stated.

By the Court: Very well, the same ruling.

To which ruling of the Court the Defendants, and each of them, by Counsel, then and there duly excepted at the time, and still continue to except.

[fol. 61] By Mr. Edwards: Do you recall testifying to what I will read to you, on Page 199? "Q. And you didn't ex-

amine the engineer's side quite so close? A. Not so close, no." Do you remember testifying to that?

A. Yes, I do.

Q. And that is true, isn't it?

A. Yes, sir.

Q. "Q. Why was that difference? A. Well, because someone said that they thought that train No. 106 backing into Grand Central Station is what struck this man. Q. You mean Haney? A. Yes." Do you remember testifying to that?

A. Yes sir.

Q. That is true, isn't it?

A. If Your Honor would allow me to explain—

By the Court (Interrupting): Just answer the question.

By Mr. Edwards: That is true, isn't it?

A. Yes sir.

Q. The next question: "Q. That is, someone told you that at the scene of the accident? A. No, he didn't see the accident, I heard someone say that is what happened." Did you so testify?

A. Yes.

Q. And that is true, isn't it?

A. Yes, sir.

By the Court: Now, do you want to explain your answer?

By the Witness: Yes sir.

By Mr. Edwards: Explain any answer you want to.

By the Witness: What I was going to do was to explain why I made a closer inspection on one side than the other. It seems like he is stressing very heavily on that.

By Mr. Skinker: May it be understood our objections are renewed to all of these questions with reference to this hearsay testimony, what he heard somebody say?

By the Court: The same ruling.

By Mr. Skinker: And we will have to make objections every time.

By the Court: Yes sir; the same ruling.

To which ruling of the Court Defendants, by their Counsel, and each of them, then and there duly excepted at the time and still continue to except.

[fol. 62] By the Witness: I want to go into detail and show why I have to make a closer inspection of one side than the other. If that side is in an accident—

By Mr. Gentry: (Interrupting) I object to going any further on that.

By Mr. Edwards: Do you want to hear what he wants to explain?

By Mr. Skinker: We will object to that.

By Mr. Edwards: All right, we will proceed then. Now, Mr. Skinker, there is a further answer to that same question, where you made an objection.

By Mr. Skinker: Just a moment, we object to that. We object to that answer and ask it be stricken out as purely hearsay, "That is all—I didn't get who it was." That is really part of the other.

By Mr. Gentry: He says, "I didn't get who it was."

By Mr. Edwards: The witness says, "That is all," and Mr. Skinker interrupted the witness, and the witness said, "That is all—I didn't get who it was." You testified to that, didn't you?

A. Yes.

Q. And that is true, isn't it?

A. Yes.

Q. "Q. (By Mr. Edwards) All right, who told you that, and when? A. I don't know who it was, I just heard them talking around there." "Q. Who did you hear talk and where? A. I don't know who it was, down where Haney's body was laying on the ground." Do you remember testifying to that?

A. No, I didn't mention the body.

Q. And what I have read to you then, you did not testify to?

A. No sir.

Q. You deny that you testified to that?

A. Yes sir; in those words that you have, yes sir.

Q. The next question, "Q. Where Haney's body was laying on the ground? A. Yes. Q. That is where you heard this statement made? A. Yes sir". Do you remember testifying to that?

A. No sir.

[fol. 63] Q. "Q. Somebody said they thought something sticking out on the train hit him, is that right? A. That is what I heard there."

A. That is right.

Q. You testified to that?

A. Yes sir.

Q. "Q. That is what you heard there." Now, shall I read the objection, Mr. Skinker?

By Mr. Skinker: Yes sir.

By Mr. Edwards: (Reading) "Mr. Skinker: Just a moment: I want to object to that as hearsay and improper and may it go to all similar questions? By Mr. Edwards: Yes." Now, the next question: "Q. That was down there when you first went down and saw Haney's body? A. Yes." Do you remember testifying to that?

A. No.

Q. That is when you first went down there, is that true?

A. I did not go down there but one time.

Q. Well, part of that answer is right, isn't it?

A. Yes sir.

Q. When you first went down there?

A. Yes sir.

Q. That is where you heard this statement made?

A. Yes sir.

Q. "Q. You heard someone there where the body was, saying that they thought something sticking out on the train hit him, is that right? A. That is right." Did you so testify?

A. Yes sir.

Q. And that is true, isn't it?

A. Yes sir.

Q. "Q. When you heard that you went back and examined the train? A. That is right." Is that right?

A. That is right.

Q. And you so testified?

A. Yes sir.

Q. "Q. Now, is it possible this mail hook could have hit him"? Wait a minute, I did not lay the foundation.

By Mr. Gentry: Just a moment before we pass to that subject.

By Mr. Edwards: That is right. I have finished with it, to that point.

[fol. 64] (At this point the following was had out of the hearing of the Jury.)

By Mr. Gentry: Now, on behalf of the Illinois Central, I have a motion to make, and I want to preface it with these remarks. Counsel was fully advised in advance as to the objections that would be made to the questions that he has asked, as to the impropriety of them. He has persisted in reading this in the presence of the Jury, and has thereby brought in hearsay testimony in a way that is most prejudicial, and has embodied in it testimony as to the opinions of unknown witnesses. And therefore we think that there cannot be a fair trial for this defendant in this case from this point on, because such testimony was improperly brought in, and it has prejudiced the minds of the jurors to such a point that they cannot give us a fair trial, regardless of what the Court may say in its instructions, and the other evidence. And we therefore ask that the Jury be discharged and a mistrial ordered.

By Mr. Skinker: Defendant, Frisco Trustees, has moved that the testimony referred to, which has been read and which has been dictated into the record by the defendants' counsel, that be stricken out, and the Jury instructed to disregard it. We then join in the motion with the Illinois Central Counsel, Judge Gentry, in asking that on account of the prejudicial matter that has gone before this Jury, dealing with the most vital part of the case, that the Jury be discharged, and a mistrial declared.

By Mr. Gentry: Let me say to Your Honor, I would like to have my motion to strike out embodied ahead of the motion to discharge the Jury.

By the Court: Motion denied.

To which ruling of the Court, the Defendants, and each of them, by Counsel, then and there duly excepted at the time, and still continue to except.

[fol. 65] By Mr. Gentry: Then I renew the motion I have made to discharge the Jury, and for the reasons stated.

By the Court: Motion denied.

By Mr. Skinker: The Frisco renews its motion.

By the Court: Motion denied.

To which ruling of the Court the Defendants, and each of them, by Counsel, then and there duly excepted at the time, and still continue to except.

By Mr. Edwards: All of the matters that I have just asked you about, the statements that you say were made, as I understand, were made down there near that switch that Haney threw to let the Frisco train in?

A. Yes, sir.

By Mr. Edwards: Now, Your Honor, might I offer the excerpts I have read from the deposition of this witness into evidence without re-reading them, as a part of the examination?

By Mr. Skinker: I think they are already in evidence.

By Mr. Edwards: I want that understood. The questions I have read and you have checked me, that they were correctly read and as set out in this deposition.

By Mr. Skinker: Yes sir: I think so.

By Mr. Edwards: I want to offer those statements in evidence as part of the examination of this witness.

By the Court: The record may so show.

(Mr. Edwards thereupon resumed examination of the witness as follows:)

Frisco train No. 106 had a mail car on it which was near the engine. On the side of the car it has what we call a mail pouch catcher. Some people call it a mail hook. The lower part is of iron about $\frac{5}{8}$ of an inch thick and is round and has a little curly tail at the bottom which is also round. The hooks fasten on a pivot. They do not swing unless you pull them down. They are not fastened to the side of the train. When the mail clerk inside of the [fol. 66] car pulls down on the handle it raises vertically out. In other words it sticks out 25 inches, 2 feet and 1 inch. But you have to pull down on the handle on the inside of the car to swing it out. None of them swing out about 3 feet from the side of the train. In my deposition I testified that there was one hook on each side of the car; that it was iron and V shaped; that one side of it is fastened through brackets on each side of the door posts and the other hangs down against the side of the car with a handle on top and that it can be extended out to the side of the train. I don't think I told you it could be extended out 3 feet, because I know better than that. That is not true. I did not tell you that. These hooks are loose so that you can go along the side of the train and raise them

up with some effort. You cannot lift one of them with your little finger, there is too much weight to lift that with your little finger. I testified that probably you, who are a little taller than the average man, could raise them, and that is true.

There was a little raised place north of the Frisco track. I didn't measure how high it was but it was about 18 to 20 inches above the rail. That mound was there when I went down there after Haney was killed.

Cross-examination.

By Mr. Skinker:

I was up in the station on the evening of December 21, 1943. I recall going down to the scene of the accident. I was down there, I don't think it was over 15 or 20 minutes at the most, maybe not that long. Then I went back to the station and I started to inspect one side by myself and then I met the car inspector L. J. Armand. He is dead.

That was a routine inspection that Mr. Armand was making; in other words, the car inspector would go over the train every night when it got into Memphis. He looked for anything that might be defective around the train. A [fol. 67] car inspector is the man that you see around passenger stations at night, going along with a lantern and flashing it at the wheels and sides of the train.

Armand was there inspecting the train when I got back. I continued with him, and he and I went back around to the left side of the train. When anyone is found in the yards where a train has gone by and there is any possibility of the train being involved, it is our duty to make out an inspection on a form we call form 171, which is a regular equipment inspection form that we have to make a report on regardless of whether the train was involved in it or not. Armand and I together made the inspection and made out the form together.

I inspected both sides of that train. I inspected the mail car which was right behind the tank of the engine.

We did not find anything on either side of the train in the way of an object protruding out from the side of the train. We did not find any rods, stick, wire or any kind of object. We looked for anything that might be sticking out.

The baggage cars and mail cars have sliding doors on the inside of the cars about 6 inches from the outside. They slide back and forth along the inside wall of the car.

The coaches and Pullmans have what are commonly called vestibule doors. They swing towards the inside before you can raise the trap door. There are no doors on any passenger car that swing towards the outside.

The mail arm is on a bracket across the door of the car and it is worked by the U. S. postal man on the inside pressing down a handle. He has to open the door first and then he pulls down on the handle on the inside of the car. It is about 18 inches long on top of this mail pouch catcher that swings the bottom part of the catcher out. If he does not hold the handle down the catcher goes right back against the side of the car.

[fol. 68] When a passenger goes up the steps onto a passenger coach or Pullman car there is a handle for him to take hold of as he starts up the steps. That sticks out about 3 inches from the side of the car. When the mail catcher arm is hanging down by the side of the car it does not protrude out as far as the hand rails of the coaches. There is a hand rail on the mail car door and the mail catcher stands out 5.8 inches, which is the clearance of the iron itself. It is resting against the grab iron and extends out $\frac{5}{8}$ of an inch farther.

From the top of a tie on the track it is 8 feet $11\frac{1}{2}$ inches to the center part of the bracket of the mail catcher arm. That is the bracket that holds the arm. So when the mail catcher arm itself is extended out horizontal, like it would be in catching a mail pouch, the arm itself would be a little over 8 feet above the top of the ties.

Cross-examination.

By Mr. Gentry:

When Mr. Edwards asked me a while ago if the dump or dirt was north of the track, next to the switch that we have been talking about, I did not mean to say that it came right up against the switch. Mr. Young and I stepped it off that night and if I remember right, it was 15 feet away from the switch.

I do not know who made whatever statements were made down there at the scene of the accident. I am referring to the place near the switch that Haney threw. Whatever

statements were made to us there by people who came up into the crowd were made by someone, but I don't know who it was and I don't know whether the person or persons that made such statements were present when the accident happened or not. I don't know whether they claimed to have been present or not and I don't know how soon they got there after the accident was over.

When I got my first information about Mr. Haney being [fol. 69] hurt, I was around the station master's gate in the station and then Mr. Young came through and he says: "Let's go out on Broadway; I understand Haney got hurt." That was the first information I had. We walked down there. It is about a half mile from the station gates.

By Mr. Skinker: Now, Your Honor, in view of the testimony, I want once more to renew the motion that the testimony as to the hearsay, what he heard somebody say, be stricken out. It is too far removed from the accident and not by anyone who saw it or purported to see it.

By Mr. Gentry: I make the same objection, the same motion on behalf of my client.

By the Court: Motion denied, both motions.

To which ruling of the Court the defendants, and each of them, by counsel, then and there excepted at the time and still continue to except.

Redirect examination.

By Mr. Edwards.

I suppose it was an Illinois Central switchman who made the statement to me about something sticking out of the train hitting Haney. There was no Frisco switching around there at the time. I said that the statement was made by a railroad switchman because there was a gang of switchmen around him when I got there. They all had lanterns. I had my flash light. I said a moment ago that the man who made the statement was an Illinois Central switchman down there at that switch that Haney had thrown. I think that is true, no one else was around there but IC men at that time. I know it was a railroad switchman there in the yards and the statement was made in the location near the switch. There were several people there when the statement was made, and that was the one time I went down there.

The mail pouch hook that Mr. Skinker asked me about extends about 26 inches when it is raised preparatory to [fol. 70] catching a pouch. If it was raised up it would be extending about 26 inches from the side of the train, but they would have to open the door to do that.

I have been watching them back in there off and on for 40 years. As they backed those long trains in there the side doors on the express cars and mail cars are shut. I have seen them open after they backed into the depot. I never saw any open as they backed into the depot. When a man is working in there he is supposed to keep those doors closed. After they leave the main track and get out on the main line where I was I have seen them opened.

I was down at the switch where the accident happened longer than 3 minutes because Mr. Young and I walked around the place and stepped off the distance from the switch to the spot. And I talked to some of their city detectives there for awhile. I claim that I was there when Haney's body was not there. I did not testify in my deposition in speaking of what had struck Haney that it could have been a round pipe; that he was not turned over while I was there and that I was there about three minutes and that I returned to the place after the body was moved. That is not true and I did not make those statements. As I told you, I never did see the body.

Plaintiff's counsel thereupon offered in evidence the entire deposition of said witness Drashman from which he had been reading to the witness on the stand.

Both counsel for the Frisco Trustees and counsel for Illinois Central Railroad Company thereupon objected to the offer of said deposition on the grounds previously stated by them respectively.

Which objections were by the Court overruled; to which ruling of the Court the defendants and each of them, by counsel, then and there duly excepted at the time and still continue to except.

[fol. 71] Omitting formal parts, said deposition, in narrative form, is as follows:

JOHN JOSEPH DRASHMAN

My name is John Joseph Drashman. I live in Memphis, Tenn., and am employed by the Frisco Railroad, as coach

foreman of passenger equipment, to supervise cleaning and repairs of all passenger equipment, and I occupied that position in December, 1939. I believe I knew Lyman Haney, I was not well acquainted with him, but I know where he worked as a switch tender.

I was up around the station master's office on December 21, 1939, when I heard there was an accident. I went down to the switch tender's shanty. I don't think the body was by any switch. I saw Haney's body but I didn't measure how far it was from the Frisco tracks. My best judgment would be about 6 feet. I believe the head was toward the west and he was lying on his face with his back up if I remember right, but I am not sure, because I didn't pay that much attention to it. He could have been facing east.

Mr. Young, our superintendent of terminals, and I went down there together. I don't know who was there when I arrived. There were several parties there and I think this I. C. switch engine foreman, Brusco, was there and several of the city plain clothesmen were there. The men I speak of were there when I got there.

I saw what looked like a hole knocked in the back of Haney's head, like someone had struck him with a blunt instrument of some kind. It looked like a caved in place, it wasn't exactly a cut place, it looked like someone had hit him with a club or something. That could have been with a round pipe. I did not see Haney's face. He was not turned over so I could look at his face while I was there. I imagine I remained there about three minutes. [fol. 72] I returned to the place after the body was moved. There was a spot of blood there about six inches across which I judge was about 6 feet, or something like that, from the Frisco track. I mean south of that track where the Frisco backs in. That track runs generally east and west and the blood was south of the rail, I don't know just how close to the switch. I saw the blood after his body was removed. I did not see it while the body was there. I saw blood on his head there.

I returned to that place the same night and Mr. Young and I were down there together. He went with me both the first time and the second time. The second time we were there, there were three of the plain clothes city detectives, I think. I don't know who they were. I did not

measure the distance from where the blood was. There may be what you call a mound; there is a pile of dirt piled up there. I don't know where it is with reference to the switch. I don't know just whether it was north or south. I didn't pay any attention to it. I imagine it was about two feet above the rail and it was several feet long. It extends both east and west of the tracks.

I supervise repairs and cleaning of equipment on such trains as this Frisco No. 106.

After Haney was found, I examined that train in the station after it was backed in under the shed. After I learned of the accident, I went down and saw Haney and came back and examined the Frisco train. I did that personally to see if there was anything protruding on the side of the train, any grabholds, any handles or anything outside of the cars. I believe there were nine cars. They had a combination mail and baggage, two baggage cars, two coaches, diner, and two sleepers. There was one mail car, combination mail and baggage. I looked along that train and found nothing. I looked because that is customary if we have a report of any kind of an accident, [fol. 73] whether we are involved in it or not, to make an inspection. We do not examine a train like that if we have no report of an accident. We have an inspector who does that kind of work. I made a special examination on this occasion and found nothing wrong.

There was a hook on each side of the mail car. It is iron, V shaped. One side of it is fastened through brackets on each side of the doorposts, and the other hangs down against the side of the car, with a handle on top. That can be extended out to the side of the train, you can swing it out three feet to the tip end of the hook. The body of a mail car extends out not over 14 inches beyond the rail. No other part of the train extends out any farther to the side. I went around both sides of the train, but particularly on the engineer's side—on the—it was on the fireman's side. I looked at the fireman's side very close and I didn't examine the engineer's side quite so close, because someone said they thought that train No. 106 backing into Grand Central station is what struck Haney. The man who told me that at the scene of the accident didn't see the accident. I heard someone say that is what happened. I didn't get who it was. I don't know who it was, I just heard them

talking around there down where Haney's body was laying on the ground. Someone said they thought something sticking out on the train hit him. That was down there when I first went down and saw Haney's body. I heard someone there where the body was saying that they thought something sticking out of the train hit him. When I heard that I went back and examined the train.

It is not possible that this mail hook could have hit him, because the body was too far from the north rail and it is above the average height of a man's head. I don't know that the north side of the rail would be lower than the south. I don't think that there is that much elevation there [fol. 74] to cause the equipment to lean any to the north. I would say it was not.

These hooks are all standard; they do sometimes get bent, but very seldom. They do not sometimes swing out from the side of the train, the weight holds them against the side of the car. They do not tie them to the side of the train, the mail clerk has got to use them. The last time I was in the Frisco yards was about 12:15 today. I was down at Grand Central station last night. I don't know that they have got one tied down there right now. If they have, I haven't seen it. I have never seen them that way.

Switch tenders like Haney have no duty to perform under my supervision and I do not know a thing about their duties.

I never saw Haney after that first time I went down there that night. I do not know how soon they removed Haney's body after Mr. Young and I first went to the scene where he was found.

This Frisco train that I have described had two baggage coaches. I do not know what they were carrying because various commodities were shipped by express companies at that time.

I imagine they were pretty heavily loaded, but I don't know. I don't think the train was any heavier than usual on account of its being just before Xmas time. I think the number of coaches was about what they have as a rule.

Cross-examination.

By Mr. Skinker:

The lever I have been talking about is called a mail pouch catcher. It is the metal rod that is V-shaped and used to

pick up packages, usually of mail, while the train is in motion. The agent hangs the mail on a hook and while the train is in motion the mail clerk swings that handle out that way and that catches the sack in the V shape there. [fol. 75] There is no way to move that handle except as the U. S. mailman in the car moves it. It moves from in the doorway. In other words he presses down on the handle on the inside of the car, and that brings the pouch catcher up on the outside about 8 feet above the rail. I believe I knew Mr. Haney in his lifetime. I believe he was about my height and I am 5 feet 6.

I examined the entire train from the front to the back and on both sides and found nothing out of kilter or nothing irregular on any part of the train. There was no kind of rod or pipe or mail pouch catcher or anything of that kind standing out from the side of the train on either side, on the occasion in question. There was nothing out of line whatever. Everything was in its regular normal place.

Redirect examination.

By Mr. Edwards:

Probably you could go along the side of the train and raise these mail hooks up. They are not fastened down to the side of the train at the bottom. You can raise them up, but they will not swing out with the motion of the car.

Cross-examination of the Witness at the Trial.

By Mr. Gentry:

As to the man who made the statement about something sticking out of the train, I thought he was an Illinois Central switchman; but as a matter of fact, I did not make any investigation or any effort to find out whether that man was working for the Illinois Central or for the Yazoo & Mississippi Valley Railroad, and I do not know what railroad company that man was working for.

Redirect examination.

By Mr. Edwards:

I do know though from his appearance that he was a railroad switchman. He was dressed and had all the appearance of a railroad switchman.

[fol. 76] I saw blood on the mound, not near the switch, about 15 feet from the switch. I do not remember testifying that this blood that I saw was within about six feet of the track. I did not measure the distance and I did say in my deposition that I judged it to be about six feet from the Frisco tracks. I told you it was north of the track; I did not tell you it was south of the Frisco track that I saw the blood. The mound is north of the track. There is no mound south of the Frisco track. I did not testify in my deposition that the blood was about six feet south of the track. I did not go down there twice. I did not testify in my deposition that I went there twice. I told you that Mr. Young and I went down there one time together.

Plaintiff next offered in evidence the deposition of W. E. Turner, Jr., given on the 16th day of December, 1941, which was objected to by counsel for the Illinois Central Railroad Company because that company was not a party to the suit at said time.

By Mr. Hart: The deposition is solely against the Frisco Trustees, Your Honor, please.

By the Court: Very well.

Said deposition is as follows (omitting formal parts):

W. E. TURNER, JR., being duly sworn, on his oath deposes and says in behalf of the plaintiff:

My name is Wiley E. Turner, Jr. I am a physician and surgeon, graduate of the medical school of the University of Tennessee in March, 1939.

I have been practicing with my father, who is a physician, in Piggott, Arkansas. We were operating a clinic at that place when I was called for service in the medical department of the U. S. Army, and I am now stationed at Fort Leonard Wood.

[fol. 77] In March, 1939, I was an interne in St. Joseph Hospital in Memphis, Tennessee. On December 21, 1939, I was called to examine Lyman Haney. The main thing I was called on to do was to decide that he was dead, because he was dead, and I just pronounced him dead. I went over his body externally and then we carried him to the morgue and I assisted in the autopsy.

The photostatic copy which is now marked Plaintiff's Exhibit 1, is a correct copy of the record of St. Joseph Hospital in Memphis, Tennessee, relating to the case of Lyman Haney. Some of the entries were made by me. All of the findings at the autopsy are included in the hospital record. The cause of death was an injury to the skull and the hemorrhage from the skull injury. There was an extravasation of blood into the scalp, temporal and occipital muscles adjacent to the abrasion. There was a fracture of the calvarium radiating down from the abrasion to left and right involving right parietal, occipital right and left sphenoid bones. The accompanying hemorrhage covered the cerebrum and cerebellum. The brain substance was not grossly lacerated. Our conclusion was that the skull was fractured by some fast moving small round object. I guess it would be possible for that small round fast moving object to be a rod or something projecting out from a train that was going 8 or 10 miles an hour. I don't know anything about it, but I think it could be. Maybe an iron pipe. The other two physicians who took part in the autopsy concurred in my conclusions, and they were written into the hospital records as our opinions. That small round fast moving object, as far as I know, could have been a moving object attached to a backing train going 8 or 10 miles an hour. I couldn't say it was or anything about it. We didn't have a lot to go by, except what was on the body. I reckon it could have been that.

[fol. 78] Cross-examination.

By Mr. Studt:

I wrote a part of the hospital record and I stated in there that the fracture of the skull followed a blow applied to the head posteriorly, perhaps by a piece of iron pipe. It is possible, I would say it was possible, for it to be a small iron pipe, or something like that in other words. It is very possible in my opinion and judgment that this man could have suffered a blow by some, maybe, gas pipe or club or some similar round object also in the hands of some individual.

PLAINTIFF'S EXHIBIT 3

Plaintiff next offered in evidence a photostatic copy of the hospital record, marked "Plaintiff's Exhibit 3." It is

unnecessary to set out the entire record. On the first page thereof, under the heading "Physician's Report," is found:

"Diagnosis: Fractured Skull, Subdural Hemorrhage.

Treatment: Dead when arrived.

Where and How accident occurred: Railroad yards, cause undetermined, fractured skull by fast moving small round object.

Patient's general condition: Deceased.

What disposition was made of case: To morgue for autopsy.

(Signed) W. E. Turner, Jr."

Under the heading "Brief History" it is stated that there was an abrasion to the right posterior part of head approximately 5 centimeters long and one centimeter wide with depression of the skull under the abrasion involving occipital and parietal regions. The right side of the face was covered with dirty cinders ground into the face. The lips were bruised and cinders and blood and artificial teeth were in the mouth.

[fol. 79] The report of the autopsy which was embraced in the hospital record, showed no injuries or deformities aside from the injury to the skull. The portion of the report dealing with the skull is identical with that given in the testimony of Dr. Turner.

The anatomical diagnosis was given as follows:

Traumatic fracture of skull with associated meningeal hemorrhage. The cause of death was given as "The fracture of skull followed blow applied to head, posteriorly perhaps by a piece of iron pipe."

Plaintiff next offered in evidence as against the Trustees of the Frisco Railroad, only, the deposition of RUSSELL KAUREZ, which (omitting formal parts) is as follows:

My name is Russell M. Kaurez. I live in Memphis, Tennessee. In December, 1939, I worked for Thompson Brothers' Mortuary, as an ambulance driver. On December 21, 1939, in the evening, I was called to the railroad tracks and Florida Avenue to pick up an injured man by the name of Lyman Haney. It was dark and I couldn't give you the exact distance from Florida Avenue to the point where we

picked him up. We put him on a stretcher. I judge he was lying between about 7 and 10 feet from the Frisco track. That is just an estimate, of course. I remember he was lying on the side of a little hill about like that shown in Defendant's Exhibit B. It seems to me it was north of the track. It was not later than 8 o'clock in the evening—it was before 8. That's all I know about the case.

[fol. 80] JOSEPH FELDMAN, being duly sworn on the part of the plaintiff, testified as follows:

My name is Joseph Feldman. I live in St. Louis, am a shorthand reporter, have reported at times in the Circuit Court here and have been in business about 17 years. I take depositions and do court work, etc. I report meetings like conventions.

The deposition filed in this case on August 29, 1941, taken at Memphis, Tennessee, on May 1, 1941, of John Joseph Drashman was taken down in shorthand by me and written up on the typewriter. You asked me to go over this deposition this morning and I did so and compared it with my notes. The typewritten deposition agrees with my notes. All of the statements written in that deposition in the testimony of Drashman were correctly written down by me, and the deposition is correct in every respect according to the notes.

JULIA HANEY, the plaintiff, being duly sworn in her own behalf, testified as follows:

My name is Julia Haney. I live in Memphis, Tennessee, and have been living lately with my son near an army camp, which is Camp Van Dorn, in Mississippi. Lyman Elmer Haney was my husband. We were married on May 18, 1912. Two children were born of that marriage and are living. One is Alvin Arthur Haney, who is 29, and the other is Margery, who is now Margery Haney Linsom, and is 25. Both are married.

At the time of Haney's death, we were living at 37 West McKeller in Memphis, Tennessee. We had always lived together and he had always supported my children and me.

Q. Now, who did he work for?

[fol. 81] On objection being made to the witness' answering that question, counsel for defendant, Illinois Central Railroad Company, was permitted to question her as to the source of her knowledge before permitting her to answer.

By Mr. Gentry: *

Q. You were about to tell us in answer to a question, who did he work for. Now, from whom did you learn the fact, from your husband, or from whom did you learn it?

A. From my husband.

Q. From what he told you?

A. Yes sir.

By Mr. Gentry: Then, Your Honor, I submit that is hearsay.

By Mr. Edwards: Let me ask a few questions.

Direct examination (Resumed).

By Mr. Edwards:

Q. Your husband was paid, wasn't he?

A. Yes sir.

Q. Was he paid by check?

A. Yes sir.

Q. Did you ever see those checks?

By Mr. Gentry: I have the checks here if you would like to see them, Mr. Edwards.

By Mr. Edwards: Well, I would like to see them.

By Mr. Hart: But it doesn't cover the twenty-five years.

By Mr. Gentry: It covers the time when he was killed. I have them for several months. I can give you a little more accurately about it. Some are photostatic copies, and the original checks are there.

By Mr. Edwards: Very well, I just want the time before he was killed. These are near enough, I guess. Here is December, 1939.

By Mr. Gentry: You want the first period of December, 1939, he was killed on the 21st.

By Mr. Edwards: I guess they are all the same, they appear to be.

Q. I will show you a cancelled check that Mr. Gentry has furnished me with, dated December 15th, 1939, pay-

able to L. E. Haney, take a look at that, and take a look [fol. 82] at the back and see if that is your husband's signature on the back—is that Mr. Haney's signature?

A. No sir; that is mine.

Q. It is yours?

A. Yes sir.

Q. Did you sign his checks sometimes, and cash them?

A. I did, yes.

Q. Well, I guess that is his check though, it is his salary.

A. Oh, yes sir.

By Mr. Gentry: Have them marked as an exhibit, so that we can identify them, Mr. Edwards.

By Mr. Edwards: Sure, I will do that. I was trying to get the amounts. I suppose we can just mark them.

By Mr. Gentry: By the dates.

(At this point exhibits were marked by the Reporter for the purpose of identification, as "Plaintiff's Exhibit 6, R. W. C. 3/1/44", "Plaintiff's Exhibit 6-1, R. W. C. 3/1/44", and "Plaintiff's Exhibit 6-2, R. W. C. 3/1/44".)

By Mr. Edwards: Now, I will show you what has been identified in the cancelled checks that I have described as Plaintiff's Exhibits 6, 6-1 and 6-2. Look at all three of those, and tell us if those were checks in payment of Mr. Haney's salary?

A. Yes sir.

Q. They all are, aren't they?

A. Yes sir.

Q. Now, I call your attention, when you looked at those checks, "Countersigned Illinois Central Railroad," do you see that on them?

By Mr. Gentry: I object to that because the checks speak for themselves.

By Mr. Edwards: You offered them.

By Mr. Gentry: I did not. I loaned them to you.

By Mr. Edwards: You suggested that I take your checks, and I have them, and then I want to call her attention and ask her if she noticed that before.

By Mr. Gentry: I submit the checks speak for themselves. [fol. 83] By Mr. Edwards: You will admit that all of the checks are countersigned by the Illinois Central, and signed by the name of George Sine—S-i-n-e, it looks like?

By Mr. Gentry: I can't make out that name.

By Mr. Edwards: Well, isn't that true, all of them?

By Mr. Gentry: No sir; I think the counter-signing refers to the treasurer. That brings up an argument.

By Mr. Edwards: I don't see why, because over on the sign you have "Illinois Central," and countersigned by the Illinois Central; and up in the corner of the check, Your Honor, I call your attention again, "Illinois Central."

By Mr. Gentry: Why don't you call the attention of the witness to the other railroad there?

By Mr. Edwards: Yes sir; certainly you have several railroads on there.

By Mr. Gentry: All of that will come up as a question of argument before the Court at the proper time. I object to her testifying what is on the check. It is a matter to be submitted to the Jury and the Court.

By the Court: The checks speak for themselves.

By Mr. Edwards: I think I still have a right to show the countersigning on the side and on the check, to show who her husband worked for.

By Mr. Gentry: It is a question for the Court and Jury to determine, and not for her.

By Mr. Edwards: I asked her who her husband worked for, and you have been objecting to it, and then you produce these checks, and I took the checks and showed them to her. They are countersigned by the Illinois Central, and I insist on this.

By Mr. Gentry: The attorney asked this lady if he was paid by the defendant, and I have the checks—I said "I have the checks here". And then Mr. Edwards took the checks and submitted them to her. His statement is argumentative and should not be made in the presence of the Jury.

[fol. 84] By Mr. Edwards: That is what I say, and it is true, isn't it, the Illinois Central Railroad?

By Mr. Gentry: Which is one of the things on this, Y. M. V. Ry.

By Mr. Edwards: And doesn't it show right here "Countersigned: Illinois Central. Mr. Lines"?

By Mr. Gentry: I do not so understand it. Can't you read?

By Mr. Edwards: Yes sir; and I say it is "Connor", treasurer. Now, I insist that this lady may say who her husband worked for.

Mr. Gentry: And I object because it is hearsay.
By the Court: Overruled.

To which ruling of the Court the Defendants, and each of them, by Counsel, then and there duly excepted at the time and still continue to except.

By Mr. Edwards: Who do you say he worked for?
A. My husband told me he worked for the I. C.

By Mr. Gentry: I object to that, and ask that it be stricken. It was a definite statement that her husband told her certain things.

By Mr. Edwards: I have a right to show whether she went down to where he worked, whether he had an insignia on him. He can't shut her off so she can't testify to anything.

By Mr. Gentry: But I can make a motion and ask the Court to rule on my motion. I move to strike out the statement what he told her.

By Mr. Edwards: I say the motion is improper in view of the fact that Counsel has not permitted me to question the witness whether she knows who her husband worked for.

By the Court: It may be stricken, what her husband told her.

[fol. 85] By Mr. Gentry: And will Your Honor instruct the Jury to disregard that?

By the Court: Yes sir; you may disregard that.

By Mr. Edwards: Did your husband wear any insignia of any kind when he went to work?

A. Well, he had a little button.

Q. And what did the button say on it?

A. I think it was the lodge he belonged to.

Q. Did it show any name, or anything?

A. I thought it had YMV on it.

Q. Did he have any button that he wore on his coat?

A. Yes sir.

Q. What was that?

A. That was the same little button.

Q. Now, did you ever go down with him to work, where he reported?

A. I have been with him, yes sir, down there.

Q. And where did he report to work?

A. He reported—you mean where he worked?

Q. Yes.

A. At that little shanty down there between Florida and Main.

Q. And do you know what it was, what kind of a shanty it was?

A. Oh, it was just a little bit of a place, not enough to turn around good with a desk and chair in it.

Q. I guess like the other shanties along there at the crossing.

A. Yes sir.

Q. And what kind of work did he do?

A. He threw switches.

Q. And what did they call him?

A. A switch tender.

Q. A switch tender?

A. Yes sir.

Q. How long had he worked at that job?

A. Well, I just don't know exactly.

Q. Oh, give the Jury just about what you figure.

A. Well, off and on he has worked for the railroad for about twenty-five years.

Q. Did he work for the same railroad?

A. Yes, sir.

[fol. 86] Q. Did he have the same duties, switch tender, all that time?

A. No, sir; he had been a switchman.

Q. Who did he work for as switchman?

A. The same ones.

By Mr. Gentry: That brings up the same question again, her opinion or conclusion as to who he worked for. She answered before I could object, and I do object to it and ask it be stricken.

By Mr. Edwards: Your Honor, I will do this. Mr. Gentry furnished me with those checks. I will offer them in evidence.

By Mr. Gentry: I have no objection to offering them in evidence.

By Mr. Edwards: I will offer them all in evidence. I haven't asked her to look over them. (To witness) Will you look over these checks, each one of them, and see if they are in payment of Mr. Haney's wages, so we will know they are all checks and we can then offer them.

(Witness examines checks.)

By Mr. Edwards:

Q. Now, you have examined all of these canceled checks, payable to L. E. Haney, running from some time in July to December, 1939. I don't know whether they are all of the checks he received or not, but all of these checks were checks payable to Mr. Haney for his salary, were they not?

A. Yes, sir.

Q. You looked at each and every one of them?

A. Yes, sir.

By Mr. Edwards: I offer them all in evidence, Your Honor please, and let them be identified as Plaintiff's Exhibits 6-1, 6-2, 6-3, and so forth.

By the Court: Very well.

(Which said exhibit was therefore so marked by the reporter.)

By Mr. Edwards:

Q. Now, I call your attention to the fact that these checks [fol. 87] outside of one in December, 1939, and one in July, 1939, they are all for \$70.00 or more. I want to get his average wage if I can.

By Mr. Gentry: Well, write them all down and divide it by the number of checks, and you have it.

By Mr. Edwards: I call your attention to the checks payable to Mr. Haney from the first of July to his death in December. I have five checks here for \$77.26. I have one check for \$85.00, August 31st, 1939—\$85.14; one check dated September 15th, 1939, for \$71.86, and I have three checks for \$79.78. Now, I will ask you what do you think Mr. Haney averaged in the payment of his checks?

By Mr. Gentry: Well, if Your Honor please, I submit that would be only an estimate or a guess on the part of the witness. The true evidence is there in the checks themselves. He can add them all together and divide that by the number of checks and tell us mathematically.

By Mr. Edwards: I submit these last two checks, the one after his death is only for a part-time payment.

By Mr. Gentry: Well, of course, he was killed before the period was out.

By Mr. Edwards: They did not pay him for the full half month, apparently only paid him up to the time he was killed.

By Mr. Gentry: Well, his employment ceased.

By Mr. Edwards: What I want, is to get her idea of an average of what he earned.

By Mr. Gentry: I object to that if Your Honor please, because the facts are before the jury.

By Mr. Edwards: We don't have all of the checks on that for this period.

By Mr. Gentry: I think you have, you haven't got them in order, but you have sorted them out according to amounts. I think they are all there.

By Mr. Edwards: There are two here, one in September—no, in July, \$42.47, and the one apparently that was given [fol. 88] after his death, for \$31.00. Now, all of the rest of them are for more than \$70.00, and five of them for \$77.78, one of them is for \$85.00, and one is for \$71.86. I will ask you what was the average earning per month, if you can give us that?

By Mr. Gentry: In that time you mentioned?

By Mr. Edwards: Well, say over a year before he died, that is fair enough.

By Mr. Gentry: Well, if the witness knows.

By Mr. Edwards: Yes, sir; if the witness knows. A year before he died, what was *his* average of his salary—what would you say he averaged in his salary, earning, what was he being paid the year before he died?

By the Court: If you know.

By the Witness: Around \$165.00 or \$170.00 a month.

Q. Around \$165.00 or \$170.00 a month?

A. That is according to what they taken out on different things.

Q. Now, these cancelled checks here, I understand these cancelled checks are the net amounts—they have already taken out what they were going to take out.

By Mr. Gentry: That is a fact I don't really know, Mr. Edwards.

By Mr. Edwards: They surely did, they wouldn't have him paying it back. In other words, these checks are the net amount paid to him, and whatever is to be taken out, has been taken out.

By Mr. Gentry: I think that must be true, and we will treat it on that basis.

By Mr. Edwards: (To witness) What did you say you think he earned a month?

A. Around \$165.00 or \$170.00 a month.

By Mr. Gentry: I do not understand from the witness whether it was after the deductions, or whether that was the gross.

By Mr. Edwards:

Q. Was that after the deductions?

A. These checks here are after everything is taken out.

[fol. 89] By Mr. Gentry:

Q. Well, is that figure you are giving before things were taken out?

A. No, sir; that is around what he makes without taking it out—I mean, after it was taken out.

By Mr. Edwards:

Q. After it was taken out?

A. Yes, sir.

Q. He would average the amount you have given a month?

A. Yes, sir; after everything was taken out.

By Mr. Edwards: I offer these checks in evidence, Your Honor.

By the Court: Very well, that may be done.

(Clerk here inserts Exhibits 6, 6-1, 6-2, 6-3, 6-4, etc.)

By Mr. Edwards:

Q. Now, both of your children, I believe, were 21 years old at the time Mr. Haney was killed, weren't they?

A. Yes, sir.

Q. Your daughter was 22 then, wasn't she?

A. No, sir; she was 21.

Q. But she was married?

A. Yes, sir.

Q. Was she living at home?

A. Yes, sir.

Q. Did she pay any board, or what was her arrangement at the time your husband died?

A. Well, her father taken care of her.

Q. You mean Mr. Haney?

A. Yes, sir.

Q. Do you mean you did or did not charge her board?

A. We didn't charge her no board.

Q. You did not charge her any board?

A. No, sir.

Q. Had your husband or you charged your daughter board at any time up to the time your husband was killed?

A. No, sir.

Q. Now, your son was older, and I believe he was married, too?

A. Yes, sir.

Q. Living in his own home?

A. Yes, sir.

Q. He lived there in the neighborhood close, did he not?

A. Yes, sir.

By the Witness: Both of my children were over 21 years old when Mr. Haney was killed. My daughter was 21 then [fol. 90] and was married and living at home. Mr. Haney took care of her. We did not charge her any board at any time up to the time when my husband was killed. My son was married and living in his own home.

We received word of Mr. Haney's death about 9 o'clock on the evening that it happened. My daughter, my son and I then went down to St. Joseph's Hospital in Memphis. Mr. Haney was dead at that time. He appeared to have been injured right back of the head. There were some cinders in his face on the right side.

I did not go into the yards that night, but I did go there the next morning.

At the time of his death Mr. Haney was a well and healthy man, worked regularly, and had always been in good health outside of colds and some minor ailments. Mr. Haney always carried a pistol at night when he went to work, but never carried it when he was not at work.

He was wearing a diamond ring when he was killed and that was still on him at the hospital. The diamond lacked a few points of being a karat. He was also carrying a gold watch that was given to me afterwards. He never carried very much money, not very much more than \$10.

I am 43 years old. My husband was 47 when he was killed. I believe he would have been 48 at his next birthday on the 16th of February.

Cross-examination.

By Mr. Skinner:

I couldn't tell you just exactly how Mr. Haney's pistol looked. He was a right-handed man. He carried the pistol in a scabbard on the right side of his belt, I think. It was the usual thing for him to carry the pistol at night if he worked at night. His pocketbook was just an ordinary billfold with a compartment for cards and things of that sort and a place for bills and money to be put in. The pocketbook was never returned to me but I did get the ring and the watch. I saw the pocketbook after December 21, 1939, at the police station. It was found a week after Mr. Haney's death and we had had snow and rain, but the billfold was not soiled a bit, the rain had not hurt any of the cards or anything like that in it. There were certain cards, social security card and things of that sort in it, but there was no money in it. It was found lying up on a fence at the Crane people's place just a few steps from where they put him in the ambulance, which was on Florida Street.

Cross-examination.

By Mr. Gentry:

The checks dated December 15, 1939, and December 30, 1939, respectively, were endorsed by me after my husband's death. I went up to the office lots of times and got his money.

Every one of the other checks dated respectively July 15th, July 21st, August 15th, August 31st, September 15th, September 30th, October 14th, October 31st, November 15th and November 29th, have but a single endorsement on each of them, and that is the name "L. E. Haney". Every one is his endorsement. They are all in his handwriting.

I never knew that he had heart trouble and had been examined by a physician and had to take extra care of himself for some months before he died. I didn't know of his having any heart trouble at all.

Mr. Haney hardly ever took more than \$20 from his salary for his own expenses. He contributed the rest to our support.

At the time of his death my daughter was married but her husband wasn't supporting her. They were not living together.

[fol. 92] ROBERT J. O'BRIEN, being duly sworn on the part of the plaintiff, testified as follows:

My name is Robert J. O'Brien, I am with an insurance agency and have been in the insurance business 43 years. I have a mortality table on which policies are written. Turning to that mortality table I find that the life expectancy of a man 47 years old is 23.98 years. That of a man 48 years old is 22.36 years.

The life expectancy of a woman 38 years old is 29.62 and the life expectancy of a woman 39 years old is 28.90. Those tables are the American experience table of mortality. All companies use the same table.

ALVIN ARTHUR HANEY, being duly sworn on the part of the plaintiff, testified as follows:

My name is Alvin Arthur Haney, I am 29 years old, my father and mother were Mr. Lyman Haney and Mrs. Julia Haney. I am now in the United States Army, stationed at Camp Van Dorn, Miss., with an anti-tank outfit known as the 254th Infantry.

At the time of my father's death I had a little candy store in Memphis and that was one block from where my mother and father lived.

On the evening of my father's death, my mother came down there and told me and I went with her to St. Joseph Hospital and saw my father there. He was dead when I saw him. I didn't look at the wound on the back of his head. His face had cinders ground into the right side of it. Later that evening I went to the Frisco switch that has been mentioned in the testimony here. They threw a light down there and I seen what I thought was blood, whether it was or not I couldn't tell then because it was [fol. 93] too dark. But the next morning I went back. From what they showed me I will say there was a spot of blood from six to eight inches across. It was east of the switch and north of the Frisco tracks. I would say it was between

three and four foot north of the north rail of the Frisco track and around six or eight foot east of that switch. At the place where I saw that blood the ground was higher than the north rail of the Frisco tracks. I would say to the best of my knowledge it was about eighteen inches or two feet higher. There were cinders on the ground north of the track. There was another track farther north than the Frisco track and I would say it was around fifteen feet between the two, as far as I know. I couldn't say for sure. The height of the space between that track and the Frisco track varied in different places.

I worked with my father the Christmas before his death. As far as I know, I thought I was working for the I. C. Railroad. I say that because I was hired in the Grand Central Station, the Illinois Central Station, and that was where I was paid by checks. I say I worked for the same railroad my father worked for because he got me the job and it was right down there with him. I got paid as far as I remember the same place he got paid. We got our checks in the Grand Central Station. I don't know whose office it was we went into. I didn't pay any attention to any signs on the office.

I saw my father wearing a button, an insignia of some kind while I was there. As far as I remember, I thought it had "Illinois Central" across the top of it "Railroad Brothers, Trainmen" or something. He wore that on his cap while he was working. I just worked there through the Christmas holidays. I think it was 1938, the year before my father was killed. I loaded mail in and off the trains and sorted mail packages for different companies. Christmas presents and things like that. I was there when [fol. 94] trains would back into the station. My hours were from 3:30 in the afternoon until 11 o'clock at night.

Q. Now what was the custom of those cars, when they backed in there, those passenger cars and those mail cars and express cars, whether or not the side doors would be open or closed?

By Mr. Gentry: I object to that. What they may have done on other occasions, don't prove it was done on the occasion of this man's death. The mere fact somebody might have opened the door sometime doesn't prove anything in this case.

By Mr. Edwards: That is the very thing that I claimed yesterday when I objected to trying to show there was certain things, and they said it was competent evidence, and Mr. Drashman said in all his forty years he had never seen one that was open, and he was working there at the time this man was working there. It was for two purposes, and I think it is competent for that reason.

By Mr. Gentry: He hasn't stated all that was said by Mr. Drashman on that subject, when they got up there close to the station they opened the doors.

By Mr. Edwards: He said they kept the doors closed until they backed all of the way in, and he had *had* never known a door to be open in 40 years. I think I can show it in view of that fact.

By the Court: The witness may answer.

To which ruling of the Court the defendants, and each of them, by counsel, then and there duly excepted and continued to except.

By the Witness: I have seen them open, and back from quite a distance back. I have seen them standing open, stacked full of mail, and the doors looked like they would hardly close, they had so much mail and packages. As far as I know, the mail cars and express cars both look the same to me. I did not unload any of them. I put mail and stuff on them.

[fol. 95] I don't remember the exact distance between the station and the ends of the platforms back there where they come in, but I have seen them come that distance with the doors open. That was usually the custom as long as I was there.

My father was about 5 feet 7½ inches tall.

Cross-examination.

By Mr. Gentry:

The platform I spoke of is a platform where we sorted the mail. The platform is south of the station, quite a distance. It seems to me like it is right behind where the people start getting off. The platform extends out south of that point, I should say around 100 or 150 feet. The trains that I saw with the doors of the express cars and

mail cars open had them opened about opposite that platform.

I couldn't be positive about what was on the buttons that my father wore.

Redirect examination.

By Mr. Edwards:

From the point where I saw the spot of blood, the next morning, after my father's death, back towards the switch, the ground was different all along there. It is just where they threw the dirt up. In some places the dirt was higher and in some it was lower.

From that Frisco switch, it is about 250 feet down to Florida Street. The switch was between Florida Street and Main Street. There is no streets between there between the railroads. At that switch there is no place for vehicles to drive over. It is just right of way and railroad tracks there.

My father did not wear glasses. His eyesight was good as far as I know. He did not have any enemies that I know of. He was not in the habit of carrying large sums of money as far as I know.

[fol. 96] C. BRUCE FARMER, being duly sworn on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. Edwards.

My name is C. Bruce Farmer. I live in Kirkwood, Missouri. I am a railway postal clerk. I sort and distribute mail on the moving railway postal cars. I run on the Burlington between St. Louis and Burlington, Iowa. I have been running on the railroad as a railway mail clerk since 1925; however, I have been in the mail service over thirty years.

You called me last night and at your request I made some measurements of mail pouch hooks on trains.

These are what are known as traveling railway post offices. These cars on which hooks are fastened are various lengths. Mail cars are either 15 feet, 30 feet or 60

feet. However, the overall length of a car might be 60 or 70 feet, and there would be a partition for 15 feet of the mail car space, or 30 feet. Or another car of 60 feet might be used for mail purposes, and each one of these cars has at least two doors, one on either side. And on each door there is what we call a catcher arm. The purpose of this catcher arm is to catch mail off of a crane that is placed at various stations, while the train is in motion. These catcher arms are fastened in the doorway; about halfway up the doorway on either side there is a steel rod that runs across the door, and these arms are fastened on that, so they work on a fulcrum and when not in use they hang down against the sides of the car, and when they are in the used position they are horizontal. They can swing out from the side of the car, not to exceed a foot; I never saw one that did.

They are not fastened at any place except where they are fastened in the doorway. The measurements I took this morning were from the top of the ties to the lower [fol. 97] end of the catcher arm. The average rail would be 7 or 8 inches high, not to exceed 8 inches. The first car I measured was a Frisco car and it was 80 inches from the bottom of this catcher arm to the top of the ties. That was a 30-foot car. When the door was closed, the catcher arm could swing out a little ways, and when it swung the full distance you could swing it out it was 87 inches from the bottom of the catcher arm to the top of the ties. With the car door open it would have been 9 feet from the top of the ties.

I measured another Frisco Car, No. 205, and it was 80 inches from the top of the ties to the lower end of the mail catcher. That also was a 30-foot car. Then I measured a B. & O. 60-foot car, No. 70, and the distance was 68 inches. That was a 60-foot car. I measured a Wabash 60-foot car, No. 179, and that was 70 inches, from the end of the catcher arm to the top of the ties. All of these measurements are from the top of the ties up to the bottom of the iron hanging down. I measured a New York Central car, a 30-foot car, and it was 80 inches. I measured a Nickel Plate 15-foot car and it was 76 inches. Then I measured a Burlington car, a 60-foot car, and it was 78 inches. Those are all the cars I measured. In all my experience I have seen the catcher arms swing out a slight distance, as far as a foot. If the door is open they

can swing out as far as 26 inches to 3 feet, but they won't swing out unless somebody pulls them up; somebody has got hold of the handle and pulls them up. They won't swing more than 12 inches without that; it pivots, just from the sway of the train. They won't swing any farther with the door open. With the door open they can be pulled up, as we term it, so the end will be about nine feet above the top of the ties, but some person has to pull them up for them to do that.

[fol. 98] Cross-examination.

By Mr. Skinker:

I spoke of the distance of 80 inches, which of course is 6 feet and 8 inches, from the top of the ties to the bottom of the mail catcher arm. That seemed to be the standard height or distance from the bottom of the catcher arm above the tie on the Frisco cars. Seven inches is the height of the average rail above the tie. I have never seen those catcher arms swing out without any force from the mail operator more than one foot from the side of the car, and that would ordinarily be going around a curve or at an excessive speed of the train so that it would rock. In coming into the Union Station at St. Louis, nearly all of the trains pull up and back around a curve with the back end going into the station first. I have seen that done hundreds of times. The train is supposed to be under control at all times, but I would say ten miles is as fast as they are supposed to come in. They have the conductor on the back end with the air. In backing in at a speed of ten miles an hour or less, over a switch if the track was smooth that would not throw the mail catcher out from the bottom of the car at all, but if the track was wavy, it might. It might come out a little distance from the bottom, but ordinarily not as much as a foot from the side of the car, and I have never seen it go out more than a foot under those circumstances, but the side of the car stands out over the edge of the ties about 8 to 10 inches—the overhang. These mail pouch catchers are called catcher arms. They form what you might call a V, so as to catch the mail pouch when extended out. The top of the mail pouch comes into the V of the catcher arm and you pick it up and run on. The catcher arm is always fixed so that the V, or open part, is in the direction in

which the train is going, and that is the way you operate them. So when a train was backing into the station, the closed part of the V arm would be moving forward and the [fol. 99] open part would be towards the engine. The mail cars are usually carried right behind the engine. A photograph of a mail catcher arm is now identified as Defendant's Exhibit C, and another as Defendant's Exhibit D. The photograph you now hand me, marked "Defendant's Exhibit C," represents the catcher arm of a mail car in ordinary position, the type of arm I have described to the jury. That is a fair and reasonable picture of a catcher arm, showing its construction and the way it is placed on the mail car. It looks like those I inspected and the ones I have on my cars. I point out the knob on the end of the catcher arm. It is possible to catch a pouch in there, and I have done it, when the catcher arm was not in proper position. Ordinarily it is through the V groove, but the knob is on the end either way you go. That knob is the lowest part of the arm and this door is open. The distance of 80 inches from the top of the rail up to the lower part of the catcher arm is as shown there, and that is 6 feet and 8 inches. If the mail clerk catches the handle at the top and pulls down on it, that raises the catcher arm to this height, and that is the usual distance when catching a pouch and that would make it stand out horizontal. To keep it there, the operator would have to hold the handle down inside the car and this is the place where the pouch ends up, the circle at the bottom of the V.

Defendant's Exhibit D is a fair representation of a mail catcher arm extended out at the extreme distance like it would be when the operator catches mail. There is a white scale above that which shows that from the side of the mail car out to the extreme end there is 30 inches. The mail catcher arm itself is about $26\frac{1}{2}$ inches, but the bracket takes up $3\frac{1}{2}$ to 4 inches and the total makes an extreme extension of about 30 inches. Undoubtedly that is correct. I would say that when it is done that way, that is approximately nine feet above the top of the tie.

[fol. 100] Redirect examination:

By Mr. Edwards:

All of these catcher arms are fastened to the train very solid. However, they can be slipped out of this bracket

and turned around, but that part must be solid because catches are made sometimes with trains doing in excess of 80 miles an hour, and they have to be very solid to withstand an awful lot of pressure.

This bottom of the catcher arm, as I have pointed out, is round, and is about three inches in diameter. I mean that knob down on the extreme end. It is made of steel. All I ever saw were the same shape on the end. I never saw one of them that was pointed, because if they were pointed you might run them through a mail pouch. I never saw an arm bent except when it hit a bridge or a box car of some sort.

Cross-examination.

By Mr. Gentry:

The end of the catcher arm which I have designated as a knob, is more correctly designated as a loop. It is round, but it is like a ring, and curved up so it won't run through a catcher pouch. I have never measured the exact length of a catcher arm.

Recross-examination.

By Mr. Skinker:

The upper part is a handle and part of it is made out of wood; about one-half is metal and the rest of it is wood. The entire catcher arm is outside of the door and when the door is closed it cannot be operated. The handle is, of course, above the horizontal bracket across the door.

Redirect examination.

By Mr. Edwards.

The orders are to keep the doors closed at all times except when you stop. However, the boys deviate once in awhile and in hot weather run with the doors open at times. In cold weather we run with them open when we have to keep them open. In the St. Louis yards at the lower end of the train sheds, pouches which have only a few [fol. 101] minutes for connections are dispatched at that point, and there is always a man to get them so he can convey them to different trains, whatever trains they are going

on. So there are times with a six or eight or ten minutes connection when we open the door to do that. We may open the door when the train is backing about six or eight car lengths from where the mail pouches are put off.

Recross-examination.

By Mr. Gentry:

There is a crane inside of the track and there is a catcher pouch on that crane and it is tied in the middle. It has a strap around the middle of it and the catcher arm comes along and catches it in the middle and takes it into the car.

MARJORIE HANEY LINSOM, being duly sworn on the part of the plaintiff, testified as follows:

My name is Marjorie Haney Linsom. I was married on April 13, 1936. I now live at 3172 Tutweiler Avenue, Memphis, with my husband.

Elmer Lyman Haney was my father and Mrs. Julia Haney is my mother and Alvin is my brother. That is all of the family.

At the time of my father's death, my husband wasn't working and I lived at home and he lived at his home. After my father's death, I went with my husband and he has a position and we are living now at the address I have given.

I have seen my father wear a button when he worked. It was a round button, and it has "Illinois Central" or "I. C. Railroad" on it. It was just the initials I. C. R. R. He wore the button on his cap. He had a railroad pass and on that was "The Illinois Central." He had had it for several years, he had it for my mother and my brother and myself. I rode on it a number of times. It was renewed from time to time.

I have been down to where my father worked, and I [fol. 102] know the shanty where his headquarters were, which my mother described.

I have been with my mother to the Illinois Central station to get my father's checks. To the best of my knowledge we got them just inside the station, right where you buy tickets, in one of those places there, near that. We

got checks similar to those you had here this morning. They were just checks that could fit in a billfold. It was thinner than a card, more like paper.

My mother or I could ride on that pass. We rode on it on the Illinois Central, and when we went on any other road, we got a foreign pass, they call it. We could not ride on the Illinois Central pass on another road. The pass was made out to Lyman E. Haney, employee. All I can remember that was on it was that it had "Illinois Central" on it and it was issued to Lyman E. Haney, employee.

Cross-examination.

By Mr. Skinker:

At the time of my father's death I was 21 years old and married and had been married three years.

Cross-examination.

By Mr. Gentry:

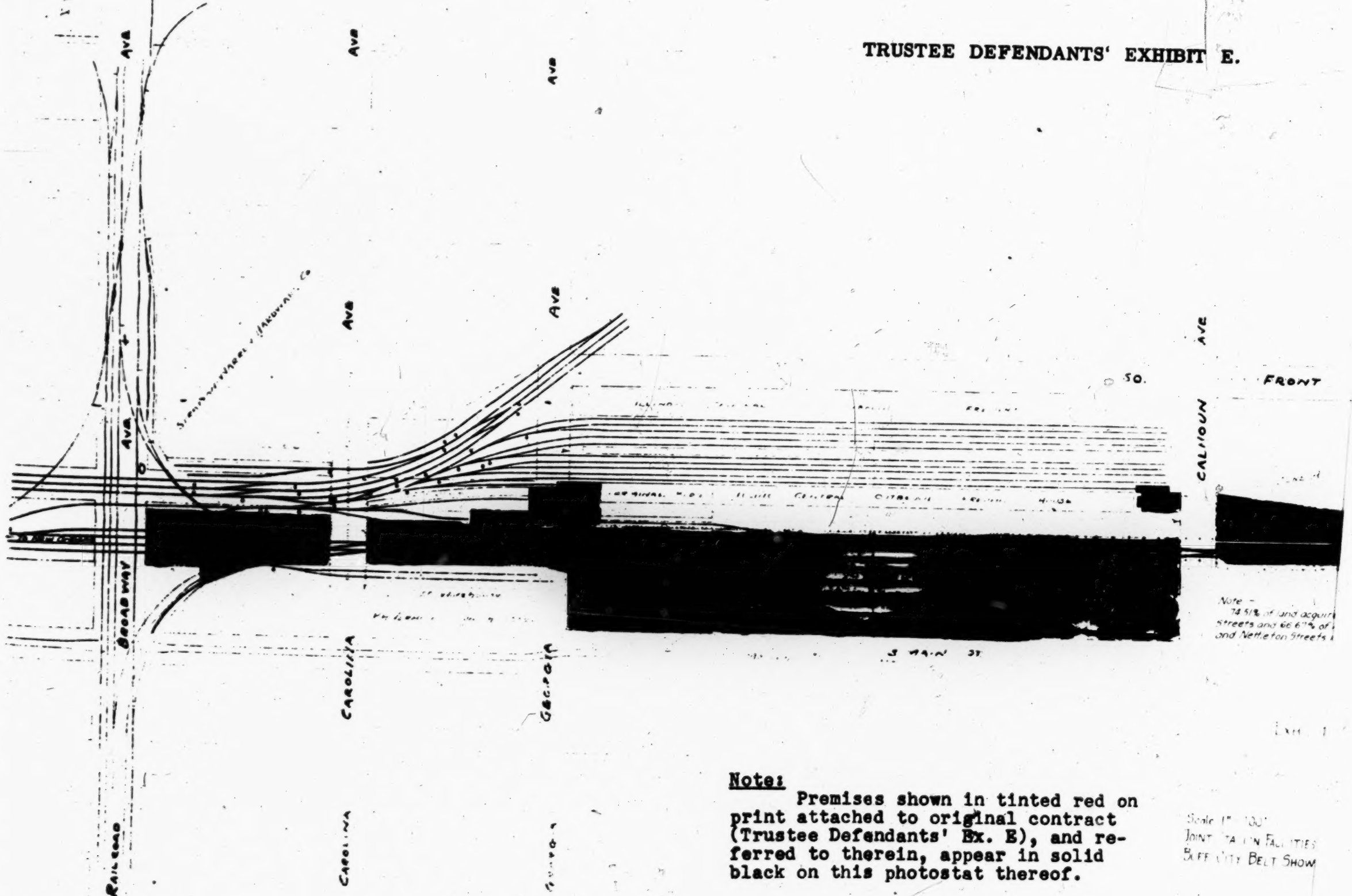
I believe the pass that I speak of had the name "Illinois Central System" on it. I didn't see that it had Y&MV on it also.

I never saw a button that my father wore on his coat or vest. The one on his cap had "Brotherhood of Trainmen" on it. It did not have "I. C. System" on it. It did not have "Y&MV" on it. It had I. C. R. R. Brotherhood of Trainmen.

By Mr. Edwards: Now if Your Honor please, I think I have offered all my exhibits. I will again offer them and pass them to the jury so they can look at them. I will offer the cancelled checks referred to and described as Plaintiffs Exhibits 6, 6-1, 6-2, and so, and then also Plaintiff's Exhibit 3, which is the hospital record, and Plaintiff's Exhibit 4, and Exhibit 4-a.

(Here follows 1 photolithograph side folio 102a)

TRUSTEE DEFENDANTS' EXHIBIT E.



Note:

Premises shown in tinted red on print attached to original contract (Trustee Defendants' Ex. E), and referred to therein, appear in solid black on this photostat thereof.

Scale 1" = 100'
JOINT TAILOR FACILITIES
BUFF CITY BELT SHOW

TRUSTEE DEFENDANTS' EXHIBIT E.

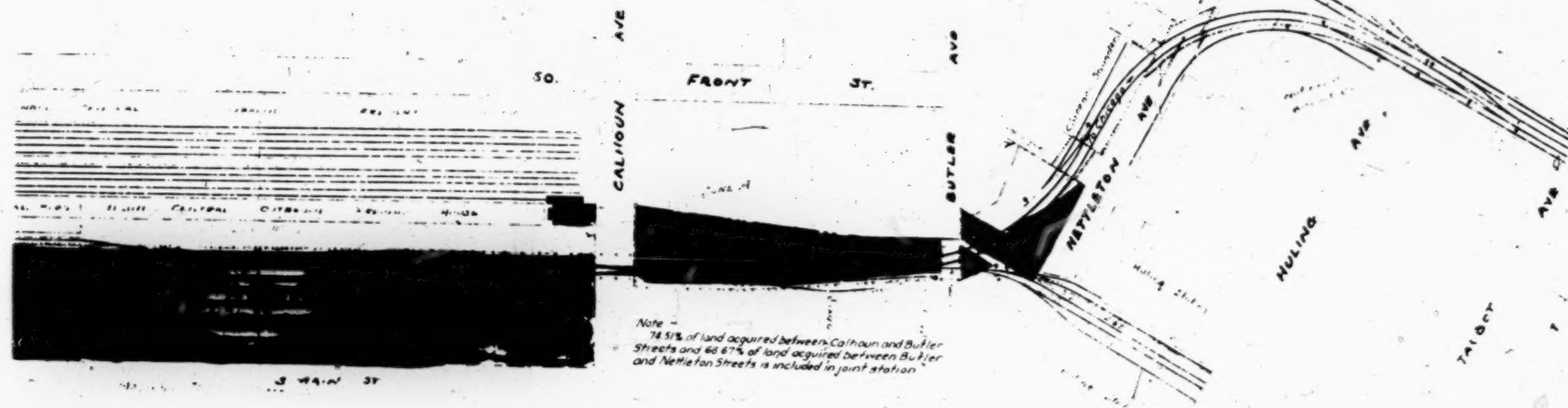


EXHIBIT A

Note:

Premises shown in tinted red on print attached to original contract (Trustee Defendants' Ex. E), and referred to therein, appear in solid black on this photostat thereof.

Scale 1" = 100'
Nov 16, 1914
JOINT STATION FACILITIES AND LAND SHOWN IN RED
BUFF CITY BELT SHOWN IN YELLOW

[fol. 103]

PLAINTIFF'S EXHIBIT 5

Mr. N. Murry Edwards, Attorney,
112 North Fourth Street,
St. Louis, Missouri.

In the trial of the above case in the Circuit Court of the City of St. Louis, Missouri, it will be admitted by the defendants J. M. Kurn and John G. Lonsdale, Trustees of Frisco Company, as follows:

1. That Frisco passenger train No. 106, which arrived at the Grand Central Station at Memphis, Tennessee, on the evening of December 21, 1939, commenced its run at Birmingham, Alabama, and was an interstate train.

2. That plaintiff's photostatic copy of the hospital record of St. Joseph Hospital, Memphis, Tennessee, dated 12/21/39, in connection with the death of Lyman Haney is a correct copy of the original of said hospital record kept in the regular course of the Hospital's business, and may be used in the trial of the above case for all purposes for which said original records might be used.

3. That on and prior to December 21, 1939, Lyman Elmer Haney was employed by the Illinois Central Railroad Company or a subsidiary corporation thereof known as the Y. & M. V. Railroad Co., as a switch tender in the railroad yards near the Grand Central Station at Memphis, Tennessee; that his duties included the throwing of switches for said railroads, and also the Frisco and other railroads using the Grand Central Station; and that for his said services the said Frisco Trustees agreed with the Illinois Central Railroad Company to, and did, reimburse said Railroad Company for two-twelfths (2/12ths) of said Haney's wages.

4. That a written agreement dated the 27th day of March, 1934, by and between the Illinois Central Railroad [fol. 104] Company and J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, with print thereto attached marked "Exhibit A", together with letter dated May 23, 1934, from W. Atwill, V. P. & G. M. of Illinois Central System to H. L. Worman, Chief Operating Officer, St. Louis-San Francisco Railway Company, St. Louis, Missouri, and letter dated May 28,

1934, from H. L. Worman, Chief Operating Officer for Frisco Trustees, to W. Atwill, V. P. & G. M., Illinois Central System, Chicago, Illinois, were in full force and effect on December 21, 1939, and had been since the dates thereof; and that plaintiff's photostatic copies thereof are true and correct copies of the original documents in the office of the Secretary for the Trustees of the Frisco Railroad. Said Trustees, however, deny that the documents referred to in this paragraph apply to the employment of said Lyman Elmer Haney, and deny that said documents apply to or include the location or portion of said railroad yards where said Lyman Elmer Haney received his fatal injuries.

Yours truly, C. H. Skinker, Jr., Attorney for Defendants, Kurn and Lonsdale.

(Here follows 1 photolithograph, side folios 105-106)

(Front)

W. C. Connelly
TREASURER

Two-Step: 99224

[fol. 107] By Mr. Edwards: The plaintiff rests, Your Honor.

And thereupon, at the close of the evidence offered by the plaintiff, the defendants J. M. Kurn and Frank A. Thompson, Trustees of the St. Louis-San Francisco Railway Company, Debtor, asked the court to give to the jury the following instruction in the nature of a demurrer to said evidence so offered by plaintiff:

MOTIONS FOR DIRECTED VERDICT

"Now at the close of all the evidence on the part of plaintiff the Court instructs the jury that under the law and the evidence plaintiff is not entitled to recover against the defendants J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, and your verdict must be for said defendants."

Which said instruction, so asked by said defendants, was, by the Court refused; and to which action of the Court in refusing to give to the jury said instruction in the nature of a demurrer to the evidence, offered on the part of the plaintiff, the defendants J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, by counsel, then and there duly excepted at the time and still continue to except.

And thereupon, at the close of all the evidence offered by the plaintiff, the defendant, Illinois Central Railroad Company, a corporation, asked the Court to give to the jury the following instruction in the nature of a demurrer to the said evidence so offered by plaintiff:

"At the close of all the evidence offered by the plaintiff the Court instructs the jury that under the pleadings and the evidence the plaintiff is not entitled to recover, and your verdict must be in favor of the defendant."

Which said instruction as asked by said defendant was, by the Court, refused; and to which action of the Court [fol. 108] in refusing to give to the jury said instruction in the nature of a demurrer to the evidence, offered on the part of plaintiff, the defendant, Illinois Central Railroad Company, a corporation, by counsel, then and there duly excepted at the time and still continues to except.

DEFENDANTS' EVIDENCE

CLAUDE JOSEPH BRUSO, being duly sworn, on the part of the defendants testified as follows:

My name is Claude Joseph Brusco. I reside in Memphis, Tennessee; am a yard conductor for Illinois Central Railroad Company, and have worked for that company continuously thirty years. All of that work has been in the yards in and around Memphis.

I knew Mr. Lyman Haney in his lifetime. I was on duty on the evening of December 21, 1939, and I was connected with job No. 152, what they call a bum engine. That was doing switching work, transfer work of freight cars for the Illinois Central. I was conductor in charge of that switch engine, and I had a switching crew under me of an engineer and a fireman, a foreman and helpers. I am familiar with the crossover of the Illinois Central tracks and the Frisco tracks at the location which has been described in this case. The main line of the Illinois Central there runs north and south, the Frisco runs east and west and they cross at right angles near where Mr. Haney's shanty was. As we came up there that evening my engine was headed north and when it got to the crossover it stopped; the board was red; it was against us. That board was controlled by Mr. Haney from the shanty where he worked. My engine stopped south of the Frisco tracks. I had no right to proceed until I got what was called a green board. I reached there right around 7:15 [fol. 109] in the evening I imagine. I was riding on the front footboard of my northbound engine. When it stopped there I got off of the footboard and walked across the tracks to the yard office at Carolina Street. I walked north up the Illinois Central track about one block from Broadway to Carolina Street. That block was about 300 feet along, I imagine. I stayed up there until right around 7:30. I did not come back to my engine until after the Frisco train 106 backed into the depot. That was while I was up at Carolina Street. I was then under the impression that Mr. Haney would then give us the green board, and as my crew came to me I would catch them at Carolina Street and then go over there to make the Mo. Pac. delivery I had hold of. The green light did not come on and after some little bit a Mo. Pac. passenger train went west, a motor car on the Mo. Pac. went east.

After those two trains passed all of us were still standing on the other side of the crossing.

Then I walked on down toward Mr. Haney's shanty and as the Mo. Pac. cut was pulled by, I walked up to his shanty and the door was locked. The light was still red against my engine and against all Illinois Central trains going north or south over that crossing. I stood there for a minute or so and I looked west in the direction of this switch at the wye where the Frisco train backs in. I saw that the wye switch was still red, the light on it was still red. That meant it was lined for the depot as the train backed in, just the same as it was when the Frisco passenger train backed in, and not lined for the main line. If it was for the main line it would show green. After I saw that this switch was red, and then for the length of time it had been red, I knew there was something wrong, because it is customary to line up that switch and for him to come back to his shanty to maintain the board that governs the crossings; then I walked up there in the vicinity of that switch. When I got up there I found Mr. Haney laying on the ground. The switch is about 250 or 300 feet west of the shanty. Haney was lying [fol. 110] face down with the right side of his face on the ground, he was lying north and south from the track; in other words, he was straight north and south and the track was east and west and he was lying on his stomach, face down, with the right side of his face down. His feet and his body were directly back of him. He was 14 feet west of the switch stand. Next morning that distance was measured by Mr. Gleason, who is head of the detective department, police department, the homicide squad in Memphis, and Mr. Ben Owens. He was a sergeant of detectives in the homicide squad at that time. They had me report to their office the next morning at 8 o'clock, and they took us down there to the switch stand. At the point where Haney's head was lying, there was a small pool of blood right at his mouth and about, or maybe not quite, a half quart lying right by the side of him. His head was 5 feet and 9 inches from the north rail of the Frisco track. We determined that by actual measurement the next morning. There was a small mark there five or six inches long, I would say where his toes drag towards the track, and I could see those dragging marks. It was practically soft dirt there. There was a small space where his toes had drag as the weight of his body, where he fell forward. I imagine those marks were

12 or 13 feet north of the north rail of the Frisco track. They appeared to be about the length of his body back from his head, as though he had slipped forward. I was the first one to him. There was nobody else around there that I could see anywhere at that time. I turned around and went back to the crossing, just the other side of Mr. Haney's shanty, east of where Mr. Haney was laying, and Mr. Bundy and Mr. Sam Arnold were there, and I called to them and told them that Haney had been hurt, and to have Sam to call the ambulance, and Bundy came with me and we went back to Mr. Haney's body. When we got back to his body there was nobody else there at the time; we two were alone [fol. 111] with him. We raised up Mr. Haney's body and turned him over. When we raised him his left hand was at his chest with his lantern in it. His right hand was on the lower part of his stomach, with his pistol laying in his hand loose. His hand was open and his pistol in it. We turned him around to the northwest so that his head would be at the side of the mound. After we raised him up and found what we did find there, Mr. Pattison came walking across the tracks from the south. He is night yard master for the Mo. Pac. Railroad. He came up there and I said, "Pat, you and Bundy stay here, and I will go down to the shanty and knock the glass out of the door and give the board to No. 4." That was the Illinois Central passenger—so they could enter the station. I broke the glass out, ran my hand through and turned the switch to give the green board to the Illinois Central tracks north and south, put the red board on the Frisco tracks east and west. As I did, the engineer of my crew whistled off and started with No. 4. I had 25 cars in the delivery I was going to make to the Mo. Pac. and when my men started off, I had to go with them because we had more cars than the two men could pass signals to, to make that Mo. Pac. delivery at Calhoun St. I left Mr. Haney back at the scene of the accident with Bundy and Mr. Pattison, and I went on with my crew. Mr. Haney was not conscious, he was breathing but he was not conscious. I did not hear him utter a word at any time.

I was back at the scene of the accident the next morning at the request of the homicide squad of the Memphis police. They had me to report to the office at the police station at 8 o'clock and then I went with them in an automobile from the police department down Caroline St. at the corner of Main. Only Mr. Owens and Mr. Gleason went with me. Mr.

Owens is the detective-sergeant and Mr. Gleason the Captain. They had me to show them where Haney had been lying and the marks and things and the condition the body was in when we found it. Some photographs were made [fol. 112] while we were down there that morning and I was present. The photograph which you now hand me which has been marked by the reporter as Defendant Frisco Trustees' Exhibit A and which purports to have been taken on the morning of Dec. 22, 1939, 11:15 A. M., was made looking east, the camera located 100 feet west of Frisco west wye main line switch. I recognize that as a photograph taken on that occasion and I myself am shown in the photograph, looking west, but the camera is looking east. They had me to stand at that particular spot as that was the spot where the blood from Haney's mouth was and that is where I identified it to the police and where I saw it the night before and it was still there that morning and they had me stand with the spot between my feet and I was facing west.

Defendant Frisco Trustees' Exhibit B is a photograph taken at the same time and place, made looking northeast, the camera located 18 feet southwest of the point where Haney's head lay. That is a closeup view of the switch stand and the territory immediately surrounding it as it appeared there that morning after the accident. That photograph was made while I was present. In that photograph is shown a white pencil inserted in the ground the white pencil nearest the track and that is the spot where the spot of blood was from Haney's mouth. That is the spot where I had my feet in the other photograph. To the north of that another pencil is shown in the photograph. That represents where Haney's feet were after the sliding had been completed. The distance from the track back to where his toes were was 12 or 13 feet. That was very close to a telephone pole immediately north of where the dragging of his feet was. From the Frisco track over to that north track, which is a joint track of the N. C. & St. L. and the Rock Island, was about 37 feet.

[fol. 113] Cross-examination.

By Mr. Edwards:

I got Haney's pistol; Mr. Bundy told me to take the pistol and put it in my pocket, which I did. I gave it to Mr. Berry, special agent, Illinois Central Railroad.

The claim agents of the railroad were there the next morning when the pictures were taken. I didn't make any mark the night before that where I found Haney, because I was never back there any more after I found him. I was there only just a few minutes that night, when I found his body, not any more than 3 or 4 minutes or 5 anyhow, and it was dark around there. I did not see the tracks that night, but I saw them the next morning. When I left there that night Mr. Pattison and Mr. Bundy were there. I don't know anything about how they carried his body away. I made the Mo. Pac. delivery while they were doing all of that. I saw the claim agents for the first time in Mr. Gleason's office and in Mr. Owen's office that morning. The claim agents did not send for me to come down there. I was supposed to be down there at eight o'clock. The claim agents came in while I was there. I was in the office of the chief of detectives and made a statement to the detectives. I did not exactly refuse to give Mrs. Haney a statement as to what I knew about this. I told her that she could get a statement from the detectives' office or from the claim agent of the Illinois Central. You were present with her when I told her that. I did not tell her that the rules of the railroad forbid me to give a statement and that I would not give a statement. I refused to give you a statement. I don't remember when that was. Mrs. Haney had not been to see me before.

Haney's next duty after the train backed in there was to close that switch and go back to his office and he should have done that immediately after the train cleared the switch. There are cinders on all cinder tracks. There are cinders north of the Frisco tracks. There is what they [fol. 114] call the cleanings, just been thrown back away from the track there. I suppose that little pile along there was about 18 inches high, that is a rough guess. It is back better than about 7 or 8 feet from the north rail. It doesn't start at the rail, it is back from the rail about 9 feet.

I work for the Illinois Central Railroad System. That consists of the Illinois Central, the Yazoo & Mississippi Valley and the Gulf & Ship Island. I do not work for all of them. I draw my check from the Yazoo & Mississippi Valley Railroad. I am railroad yard conductor or engine foreman for the Illinois Central System. The Illinois Central doesn't put out any badges of any kind that indicate the Illinois Central, or anything like that, with the exception of

one place they have a badge that they use. I carry a pass of the Illinois Central Railroad System and have carried one since I have been with them and in service long enough to be eligible to get a pass. I ride on the Illinois Central Railroad with that pass and of course do not have to pay fare and have done that ever since I have worked with them. I came to St. Louis on an Illinois Central passenger train, rode on my pass and did not have to pay fare.

I was not present when any examination of Haney's body was made as to whether there was any jewelry or watch on it or whether he had any rings, or any pocketbook in his possession. I saw no evidence of any struggle, and I saw no pipes or clubs or anything around where I saw Haney's body. I took Haney's gun away from the scene because Mr. Bundy told me to put the gun in my pocket. Mr. Bundy was my superior officer. That night, as soon as I came back from making the Mo. Pac. delivery I gave the gun to Mr. Berry, special agent for the Illinois Central Railroad, who was there at night in the territory of the depot. That was around 35 or 40 minutes after I found [fol. 115] Haney's body. I didn't pay any attention to whether the pistol was loaded and didn't even look to see what kind of pistol it was or what make it was. I didn't tell you it fell out of his hand, I said it was laying in his hand when I turned him over. When we rolled him over to the right we could see the pistol laying in his hand. Only Mr. Bundy and I were there then. He and I both turned him over. It was dark there but we both had lanterns with us and had them burning. We both took hold of him to turn him over. His hand was laying there and the handle of the pistol was laying in his hand, the same as the handle of the lantern was in his left hand. His hand was not gripped around the pistol; his hand was open and it was laying in his hand. Before we turned him over we saw a small place on the back of his head on the right side where he was injured. His cap was laying there about a foot in front of his head. It was a little white cap. I did not inspect it at all. It was not moved while I was there. There was a place on the side of his face with the dirt from the cinders where it seemed as though his face had slid in the cinders. That was on the right side of his face. His head was about 5½ feet from the north rail of the Frisco track.

When that Frisco train backed in I was at Carolina Street and it backed past me. I never paid attention to the speed of the train because I was talking to the engine foreman of the engine house. I had instructions when I came back from the Missouri Pacific to get what is known as the "slop cut" out of the house and take it to the south yards. I could not see the open switch from Carolina Street because of the building of Stratton-Warren.

The next thing I did after the Frisco train backed in, I walked down Broadway towards the south to the crossing, to Haney's shanty, about one block from Carolina Street, which would be perhaps a little more than 250 or [fol. 116] 300 feet. I walked up to Haney's shanty and the door was locked and I stood there a minute or two and looked west up the track and saw the wye switch was still red. That was the switch at the Frisco track which Haney had thrown. Then I walked up that way to see what had happened, because it was customary to always line that switch back after all of the movements had been made over it for the main line, and for Haney to return to his shanty. I had expected Haney to close that switch and return to his shanty. He had to return there in order to change the electric light to let us pull north with our engine. That light is above the center of the crossing, and is operated from within the shanty.

It was because that light was red when we came up there that we could not proceed north. He had that light for the Frisco passenger train because it was switching over Main Street there. There was another switch engine headed north that would stop for that red light 6 tracks farther across. That was Bundy's crew's engine, and No. 4 train was on the track this side of that. According to the rules and regulations, our engines had to wait until the light turned before we crossed over.

The claim agents for the Frisco Railroad and the Illinois Central System made the measurements of the things shown in these pictures marked A and B. They were talking about it out here. They were not there when I came up to the detective's office, but they came up to the detective's office afterwards. We left the detective's office, I suppose around 10 o'clock or maybe a little before 10. We went to the scene of the accident before 11:15. The detectives stopped and left the car on the corner of Main and Calhoun Streets and we walked up there to the south end of the depot

and walked around the wye around on Broadway where this accident happened. They were fully an hour, I guess, at the scene of the accident. They were not arresting me [fol. 117] and there was no suspicion against me. The reason that they had me was because I was the first man to find Haney. They asked what time I got off and wanted me to come up there and make a statement that night, but after I told them we didn't get off until late they told me to be there the next morning at 8 o'clock.

I was never down where Haney's body was lying when anybody was there besides Bundy and myself until Mr. Pattison came up. After I went and broke the glass in the door of the shanty and gave the board to the Illinois Central train, I did not go back to the scene of the accident but got on my engine and made the Missouri Pacific delivery. I did not see any other railroad men or other parties go up towards the scene of the accident after I left there. I never did see Haney's body after that. I guess I knew Haney 30 or 35 years. I was at the undertaker's parlor and saw Haney's body but did not talk to Mrs. Haney, before he was buried, as to how he was killed. The next morning after the accident there were only five of us at the scene. They were Captain Gleason, Mr. Owens, two claim agents and myself. I suppose we were around there about an hour, that is, Mr. Gleason and Mr. Owens and I were. We were just looking around and talking.

Cross-examination.

By Mr. Gentry:

You now call my attention to the photograph marked Trustees' Exhibit A, and I see the level place between the end of the ties of the north rail and the raised part in the picture. That was practically level with the ties, as you can see here. Over across that level space the cleanings of the tracks, from these tracks here and from these tracks over here, where it is mostly thrown off of the right-of-way. That is the part that I said was raised 18 to 20 inches.

From the switch stand to the point where the first pencil is shown in the photograph nearest to the Frisco track, I said was 14 feet. I saw the claim agent take the tapeline [fol. 118] and make the measurement and I read it on the tapeline as it was made. I saw them making the measure-

ment from the north rail of the Frisco track to that pencil that is nearest to it and I saw that the distance was 5 feet 9 inches, and I saw the measurement made from the north rail to the second pencil in the photograph, the one on the elevated part, and that was, I think, either 12 or 13 feet. I have in my pocket the pass that I spoke of that I used in coming up here on the Illinois Central train. I now show that to you and I'll take back that pass and give you the pass that just preceded it. The only differences are in the color and in the years in which the passes are good, otherwise the passes are identical. The pass I now hand you was good until December 31, 1943, and is now marked Illinois Central Exhibit 1. That is my signature there on the end of it and I observe the large letters at the top of it in the words "Illinois Central System." On the back of the pass are the words "unless otherwise ordered or limited on face, this pass will be honored on the Illinois Central Railroad, the Yazoo & Mississippi Valley Railroad and the Gulf & Ship Island Railroad." I know those three railroads and they go to make up the Illinois Central System. I have ridden on my pass on the Y. & M. V., but I have not ridden on the Gulf & Ship Island.

(Here follows 1 photolithograph, side folio 119.)

DEFENDANT ILLINOIS CENTRAL R. R. EXHIBIT 1.
(Front)

Illinois Central System

Pass



No. 40856

***** C. J. BRUSO AND WIFE *****

ENGINE FOREMAN, MEMPHIS, TENN.

UNTIL DECEMBER 31, 1943 UNLESS OTHERWISE ORDERED

**VALID WHEN COUNTERSIGNED BY
P. LYNCH OR J. K. LAUDER**

COUNTERSIGNED

J. H. Bevan
PRESIDENT

HOLDER SIGN HERE IN INK

THIS PASS ACCEPTED SUBJECT TO CONDITIONS ON BACK

(Back)

1941-2-3

SERVICE PASS

**NOT GOOD ON TRAINS 5, 6, 7, 8, 30, 31, 32, 33, 34, 35, 36,
37, 38 AND 39, NOR ON SUBURBAN TRAINS OR BETWEEN
SUBURBAN STATIONS.**

Unless otherwise ordered or limited on face, this pass will be honored on the Illinois Central Railroad, the Yazoo & Mississippi Valley Railroad and the Gulf and Ship Island Railroad.

This Pass is not transferable, is void if presented by any other than the person or persons named thereon, or if any alteration, addition, or erasure is made on it.

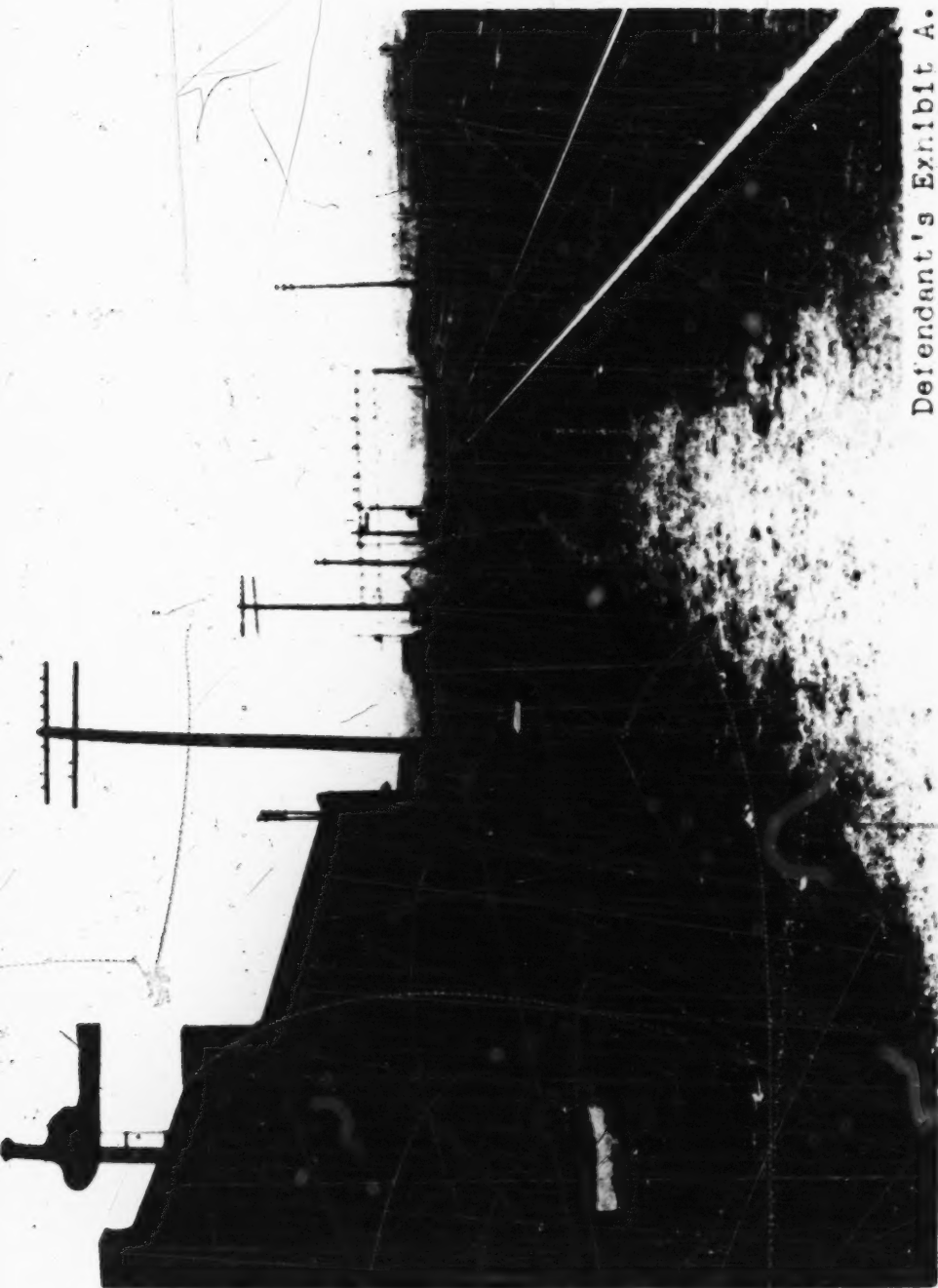
The person accepting and using this Pass thereby assumes all risk of accident or damage to person or property; states he or she is not prohibited by law from receiving free transportation, and will not use this pass in violation of any law.

[fol. 120] Recross-examination.

By Mr. Edwards:

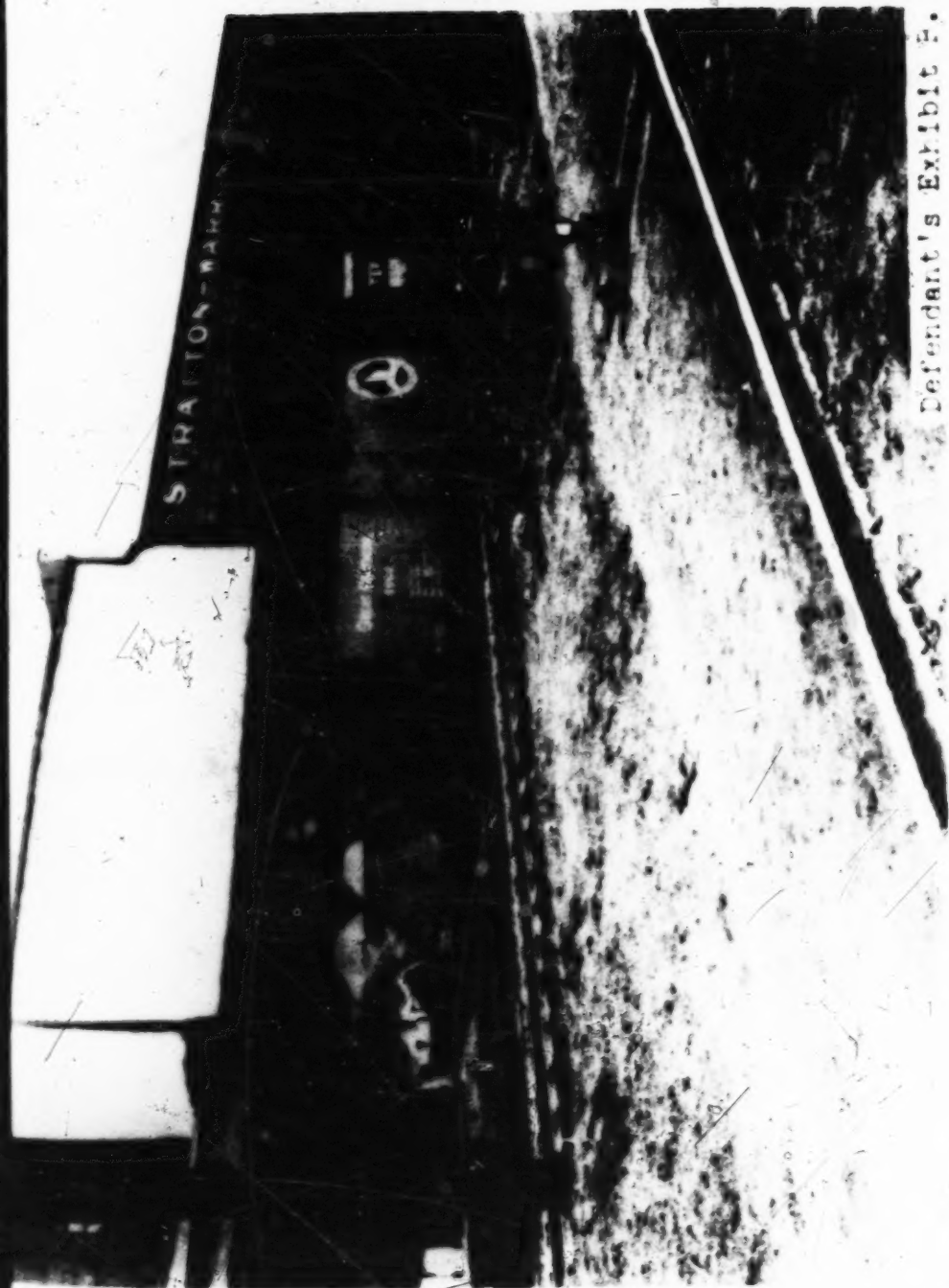
We do not have any identification that we wear when we are working. The Brotherhood of Railroad Trainmen put out a button to their members when they pay dues for the month, a small round badge with the emblem of the B. of R. T. I suppose it is about as large as a quarter and it specifies the month and the year on that button and that shows that you have paid your dues in the Trainmen for that month. Almost all of the employees that belong to the Brotherhood of Railroad Trainmen wear those buttons and the switchmen's union of North America have the same sized button. Lots of the men belong to both lodges and wear both buttons. You do not have to wear them, it is just simply to show that you are in good standing and have paid your dues in those organizations. I don't work for the three railroads of the system. I work for the Yazoo & Mississippi Valley, the Y. & M. V.

At this point counsel for the trustees, an adjournment over night having occurred, offered in evidence the Trustees' Exhibits A, B, C, and D, and the same were received without objection. They are as follows:

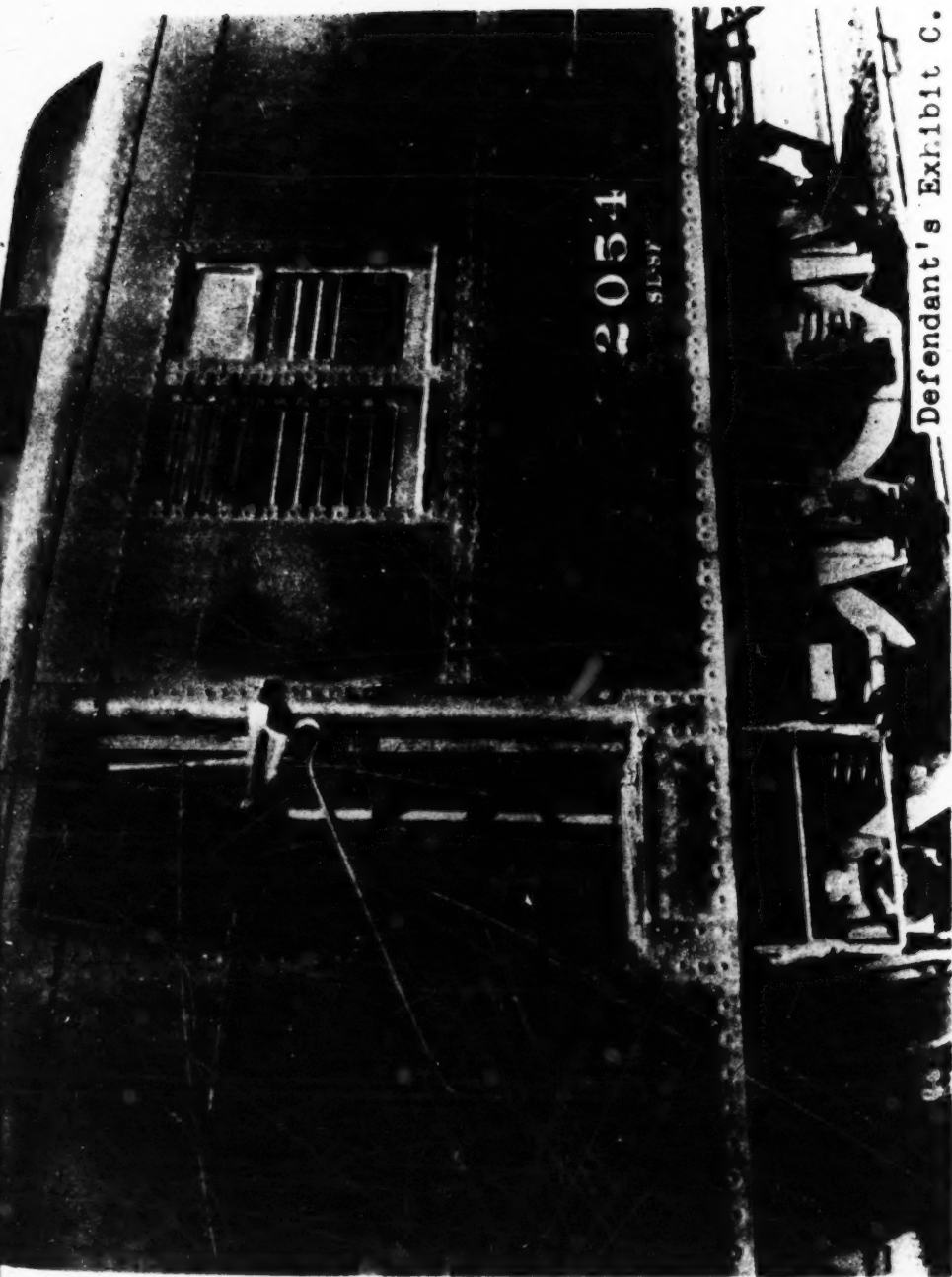


Defendant's Exhibit A.

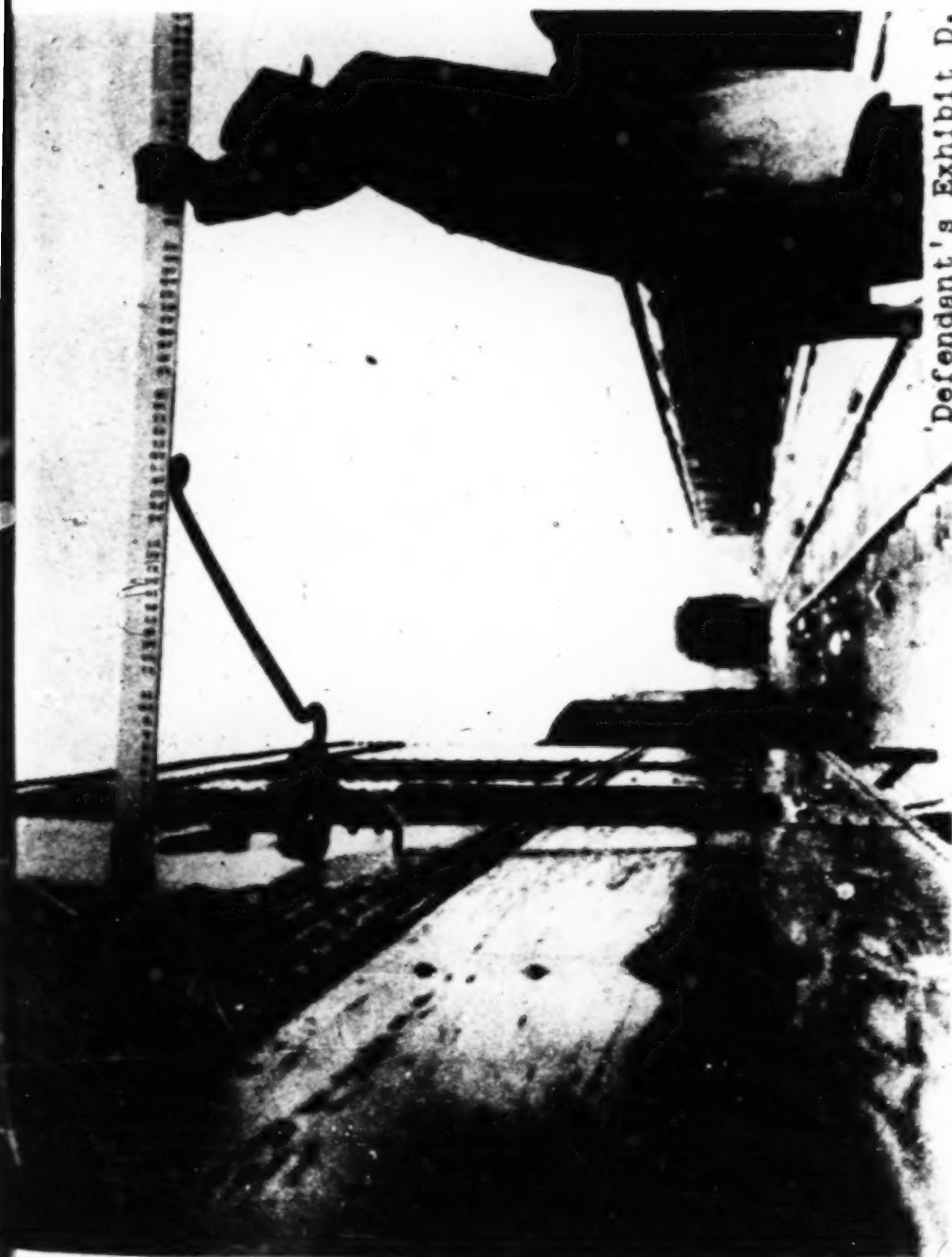
120-A



Defendant's Exhibit 2.



Defendant's Exhibit C.



Defendant's Exhibit D.

[fol. 121] Cross-examination.

By Mr. Edwards:

was thereupon continued as follows:

The two pictures marked Trustees' Exhibits A and B, respectively, were the only pictures taken on the morning following the accident that I know anything about. I do not know whether or not there was one more. I did not see them taking any pictures at the switch or east of the switch. I said yesterday there was a small mound about 18 inches high north of the Frisco track.

There was no train switched over the track at which Haney was killed after that Frisco train backed in and before I found his body. That night when I left the shanty and walked over towards the place where Haney was killed, walking about 200 or 250 feet to the switch, I could see the red light on the switch but could not see the switch. The red light on the switch designates the switch stand, but I could not see the stand until I got about 20 or 30 feet from it, and I could see the form of the body there. I did not know at that time who it was until I got up there. I have not been to that place since then.

I did not see any holster of a pistol on Haney.

On the morning following the accident when the pictures were taken a commercial photographer named Pollard took the pictures. Mr. Gleason and Mr. Owens directed me to set those pencils where Haney's head and feet were; that is, I showed the spots and they set the pencils there where I told them the spots were when I first saw the body.

Ora L. Young, being duly sworn, on the part of the defendants testified as follows:

My name is Ora L. Young. I am with the office of Defense Transportation, Division, Railways, District Rail Director, U. S. Government. I have charge of a district that includes Memphis and the territory in that direction. I am under [fol. 122] Mr. Joseph P. Eastman, the director of transportation of the railways in the country during the war effort, and my duties include supervising transportation for all of the railroads in my district. That has to do with

the train operation, maintenance of way, maintenance of equipment, to furnish equipment, check faulty operation to handle the shippers and load cars and all phases connected with the rail movement, including handling of troops, supplies and other materials. I am paid by the U. S. Government. I have held that position since October 16, 1942. I was notified that I had been requisitioned to go on this position for the duration by Mr. John R. Flippin, special representative of the Office of Defense Transportation at Memphis, and I was requested by the Government to take the position; I accepted it and have been there since that time.

At the time when I accepted the position I was superintendent of terminals for the Frisco Railroad at Memphis, and had a total service with the Frisco Railroad since 1913. Prior to that I had worked for the Santa Fe and the Union Pacific, and had spent my life in railroad work since I was a boy in the operating department. I worked in various positions on railroads, including working on the track, trucking in the freight house, serving as check clerk, transfer clerk, brakeman on a freight train, switchman in the yards, assistant yardmaster, assistant general yardmaster, general yard inspector, superintendent of terminals, division superintendent, and then later back as superintendent of terminals. I was in that position when I went to the Office of Defense Transportation.

As superintendent of terminals for the Frisco at Memphis, I was located out at Yale yards, five miles south of Memphis. In the early part of the evening of December 21, 1939, I was at the Grand Central station in Memphis, because of the Christmas mail and heavy passenger traffic. I was ordinarily there in the evenings, starting from the 15th of December up to and including Christmas, and I considered that a part of my duties to be there at the station during that period.

The Frisco train that comes up from Birmingham to Memphis and goes on to Kansas City is Train No. 106, and is called "Kansas City-Florida Special." I remember that train coming into Memphis that evening while I was at the station and I saw it come in. Some time after the train arrived the station master, McDonald, reported to me an accident on Broadway. Following the conversation with McDonald we looked over the equipment on train 106 on both sides from the front to the back. I did not find any-

thing in the way of rods, stakes, wires or anything else protruding from the side of the train anywhere along on either side. Everything was in its normal position from the engine to the back end. I then went down to the scene of the accident. That train passed me about a city block and a half from the depot on Carolina Avenue on my way down; as I was going down the train was leaving.

When I got down to the scene of the accident Haney's body was not there. It had been removed. The only man I noticed at the scene was switchman Bundy, an Illinois Central switchman. I went to the scene of the accident at that time and made observations. My observations were made on both sides of that wye switch stand, both east of it and west of it—from Kentucky to Main street on both tracks. There was a spot of something that was apparently blood where the head of Haney was reported by Bundy to have been. I couldn't say that it was blood. That spot which was apparently blood was just due west of the switch stand 13 or 14 feet. I stepped it off at the time. The spot was about six feet north of the Frisco track. I measured it with two steps, which were about six feet. There were two marks that could have been toe prints a little farther than the length of a man's body back where the blood spot was. Those dragging marks that I spoke of that appeared to have been made by his toes I would say were between 13 and 14 feet north of the [fol. 124] north rail of the Frisco track. It was four and one-half steps up to where the marks were. They were on top of a little mound where they put cleanings. I would have judged that distance to be 13 to 14 feet. I looked over the area between Main and Kentucky streets on both tracks for something dragging or any kind of marks that might be there. I saw no evidence of any body having been dragged along, or moved in an east or west direction or of anything else being dragged in an east and west direction. Approximately 450 feet west of the wye switch there is a switch stand on Kentucky street about seven feet high with a light on it on the north side, the engineer's side of the track. It sits back about four feet from the track.

After my investigation I went back to the station. There was only one mail car on the train as it came into Memphis. The two cars next to the engine were cut out at Memphis.

There were no mechanical defects about the cars that were left at Memphis.

After I got back to the station we looked those two cars over again. There was no mechanical defect about the cars and they assumed their regular run the next morning on 105.

There was no blood that I observed anywhere on the rails down there around the scene of the accident or on the passenger train itself or any part of it. I had an electric flashlight with me.

At that time I had been superintendent of terminals at Memphis since March, 1937, over two years before the accident happened. I am familiar with what is spoken of as Haney's shanty. In the 24-hour day, three eight-hour shifts worked there. Mr. Haney was on the second shift. The proper designation of Haney was switch tender. The switch tenders handled the traffic light on the crossing and they had four thrown switches to take care of in the vicinity. There were switches for the Cotton Belt freight trains in and out of the Iowa yards; the west wye [fol. 125] switch entering the Grand Central Station from the Frisco, one switch of the N. C. & St. L. & Rock Island which used a single track jointly and the other switch was a freight switch where freight trains and switch engines were operated right adjacent to the shanty on the north side. All of these switches were worked from the shanty by Mr. Haney, handling the lights overhead for traffic and he handled or threw all of these four switches that I have described.

I am familiar with the contract that has been called the Grand Central contract of 1934 that was offered in evidence here by the plaintiff during the trial, and I was present when it was read in court. My duties as superintendent of terminals at Memphis required me to be familiar with it. Under that contract the Frisco paid \$1.87 $\frac{1}{2}$ a car for cars that went into the Grand Central Station. They also paid for water and heat. Pay for the services of the three switch tenders, including Mr. Haney, was separate. The Frisco paid two-twelfths of the total. They paid no wages directly to any of those men, including Haney. To my knowledge, Haney was never on the payroll of the Frisco while I was superintendent of the terminals. Neither I nor any of the officials of the Frisco had any supervision over Haney. If we had cause for complaint due to a delay or

regulation we handled it with the superintendent of the Y&MV. The three switch tenders were not under my direction there. They performed a service, throwing switches, and the Frisco contributed two-twelfths of the cost of that for all three of them. The original contract, Plaintiff's Exhibits 4 and 4-a attached to it (4-a being the map), is now shown to me. It is the Grand Central contract entered into between the Illinois Central and the Frisco. I recognize it as being the original of that contract. As superintendent of terminals I had a copy of that in my office. Bills were submitted monthly under that contract for services rendered under it to the Frisco. I personally okayed the bills, which included the \$1.87 $\frac{1}{2}$ a car and any charges [fol. 126] for water and ice that I told about, but did not include the three switch tenders that worked in Haney's shanty. This wye switch was not on the station premises shown in the map attached to the contract. Haney's shanty was not on those premises. I am familiar with the following language of the contract: "The lands, premises and buildings embraced within said passenger terminal being shown in tinted red on the print hereto attached, while the tracks of said passenger terminal are shown by solid red lines on said print, and for convenience all such tracks and facilities shall hereafter be referred to as the passenger terminal." Referring to the print or plat attached to that contract, of which a photostatic copy has been identified as Plaintiff's Exhibit 4-a, I am familiar with the print or plat. It is so prepared that west is the top of the print. Broadway is shown at the left-hand side of the print and runs north and south. The Illinois Central tracks are shown running north and south, the long way of the map. The right-hand side of the print is to the extreme north and the left-hand side is the south and the bottom of the print is east. A portion of the station facilities is shown there in tinted red as referred to in the paragraph of the contract mentioning it, and the tracks are colored in red as stated in that paragraph. I now put a letter X at the point representing where the wye switch involved in this case was. That point is not in the joint facilities. It is under an expired franchise of the City of Memphis and is a city street that it is permitted to operate on. That is a designated city street. I have now placed a circle where Haney's shanty is located.

There was a letter of agreement entered into covering the payment by the Frisco of the two-twelfths of the wages of the three switch tenders, including Mr. Haney, that worked at this switch shanty and performed the service. As I recall, it was dated in May, 1935. You now hand me here a letter contract, dated April 18, 1935, which has been marked by the reporter as Defendants' Exhibit F, [fol. 127] and purports to be the Frisco's copy of the original letter contract of that date, covering switch tenders you have spoken about. I recognize that and it is a correct letter contract.

(Said letter was introduced in evidence by the counsel for Frisco Trustees and is as follows:)

Defendant Trustees' Exhibit F, written on the letter-head of the St. Louis-San Francisco Railway Company, is as follows:

TRUSTEES' EXHIBIT F

Springfield, Mo., April 18, 1936.

Mr. W. Atwell, Gen. Mgr., Illinois Central R. R. Co., Chicago, Ills.

DEAR SIR:

This letter in duplicate is for the purpose of arriving at a definite understanding with respect to the proportion of the expense Trustees of the Frisco are assuming in connection with the flagmen's service being performed at Texas and Broadway, Memphis, Tenn.

The agreement under which this service originally was a portion was dated Sept. 27, 1906, but same is no longer in effect, therefore, in order to have a definite understanding suggest the Frisco be billed by the Illinois Central on the following basis:

2/12 of the regular crossing flagman rate of pay.

2/12 of the cost of electricity furnished for operation of color signals.

The cost of fuel, ice and other miscellaneous supplies to be apportioned on the percentage the crossing flagman rate bears to the switch tender rate which is being paid at the present time. The Frisco to bear 2/12 of that percentage which runs from about 47 to 48¢ at the present time.

[fol. 128] If you are agreeable, will you please sign one copy of this letter and return.

Yours truly, F. H. Schaffer, General Manager.

Accepted: William Atwell, Vice President & General Manager, I. C. R. R.

I had a copy of that letter in my office as superintendent and we were billed for 2 12ths of the three switch tenders' wages and the expenses of those lights as referred to in there. That is the only contract we had with reference to those three switch tenders.

Cross-examination.

By Mr. Gentry:

In the course of my railroad service I became a member of the Brotherhood of Railroad Trainmen; I have held membership in it 34 years and still hold membership in it and pay monthly dues. That Brotherhood, through its lodges, have what is known as a working button. As long as I can recall our lodge has had the buttons—since 1915 or 1916. The boys were still wearing them in 1939 and are still wearing them now. One purpose in wearing them is to show that a man's dues are paid up to date and the other reason is that the switchmen's union was trying to get the trainmen as members. A button is now identified as Defendant Illinois Central's Exhibit No. 2. That button is the standard B of RT button. Some used to be a little larger than this type. This is the type they have worn for a number of years. None that I have ever seen bore the initials or name of any railroad, and I have seen a whole lot of them. The only difference in them from time to time was a change in color and in the month and year.

(Defendant, Illinois Central Railroad Company, thereupon offered in evidence said button marked "Defendant, Illinois Central Exhibit No. 2." The following is a photostatic copy of the face of the button.)

110A

ILLINOIS CENTRAL R. R. EXHIBIT 2.



128-A

[fol. 129] In examining that button I see that that is the design of button that was used by the members of the Brotherhood of Railroad Trainmen. That wheel with the spokes represents a brake wheel. The Illinois Central Railroad Company at intervals presented bills to the Frisco Railroad Company for the matters covered by the contract and also covered by the letter that I read. The services of the three switch tenders where Haney served were included in the bills once a month. The Yazoo & Mississippi Valley Railroad was a railroad corporation and it operated in Memphis and south of Memphis. In a general way it serves the Mississippi delta down as far as New Orleans.

I am also familiar with another railroad known as the Gulf & Ship Island Railroad. I checked their records the other day. That railroad operates in Mississippi and Louisiana in connection with the Illinois Central. It is also a separate railroad corporation. I am familiar with the Illinois Central Railroad which begins in Chicago, Ill., and extends to New Orleans and Birmingham. It goes through Memphis.

I am familiar with the term Illinois Central System. That is the name that is used to designate all three of these railroads making up the system, just as we see advertisements in St. Louis about "Missouri Pacific Lines" or "Frisco Lines," where separate railroad corporations are included in the term "lines."

I was familiar in a general way with the employees of the Y. & M. V. Railroad down there and with the station called the Grand Central Station at Memphis. The Chicago, Rock Island & Pacific, Frisco, Illinois Central and Y. & M. V. Railroads ran their trains into and out of that station in 1939. The Rock Island does not have offices or places of business in that station building, but the Illinois Central and the Yazoo & Mississippi Valley do. A few years back the Frisco Lines used to have a superintendent's [fol. 130] office in the building, but they did not in 1939. The I. C. and Y. & M. V. did.

Florida Street is west of Main Street. Main Street is approximately 200 feet east of the shanty which I marked with a circle on the plat. Main Street runs north and south.

Florida Street is approximately 125 or 150 feet west of the switch and Kentucky Street is about 350 feet west of Florida Street. Florida Street and Kentucky Street, as

well as Main Street run north and south. Broadway runs east and west.

Cross-examination.

By Mr. Edwards:

I live in Memphis. I do not still carry a pass on the railroad. I came up here on a pass on the Frisco Railroad.

My office is now at 403 Corn Exchange in Memphis.

The contract is with the Illinois Central Railroad. I couldn't testify as to the ownership of the Grand Central Station. I never made inquiry about that. The contract is signed by the general manager of the Illinois Central. The name of the Yazoo & Mississippi is not on the contract.

Under the contract of April 18, 1935, I paid 2 12ths of Haney's wages to the I. C. Railroad on the Yazoo & Mississippi Valley bill. I didn't make the payment, I signed and okayed the bill, but this contract stipulates that. The bills presented were according to the contract and I couldn't testify as to the payment, the accounting department vouchers our bills. The operating department did not make the payments. As far as receiving monthly bills that I okayed, the contract of April, 1934, was carried out; so far as payments, I don't know. I couldn't definitely tell you whether the Illinois Central Railroad Company owns the Yazoo & Mississippi Valley, because I don't know what the setup is. The Illinois Central System is composed of three railroads that I know of. I could not say definitely [fol. 131] whether the Illinois Central owns any interest in the Yazoo & Mississippi Valley or not.

On the night of the accident, Dec. 21st, I received, at the station, word that Haney had been injured. I couldn't tell you just exactly what time I received that word, it was up around 8 o'clock, possibly a few minutes before, maybe a few minutes after. I then went and looked the equipment of the Frisco train over. We were responsible for the operation of all Frisco trains. I personally examined trains where there was a report of an irregularity, where the train might be involved. That is the reason I examined this train, to protect our interest. After the train left, I went down to the scene of the accident to protect the interest of the company. I did not write down the measurements that I have been testifying to. I mean to tell the jury that without writing this down I independently re-

member that the blood I saw down there that night was 6 feet from the track and that I saw certain imprints in the sand 13 to 14 feet from the track. I did not write it down or make any memoranda. I reviewed the statement I made, but I knew that before I came up here, I was equipped that night with a flashlight. I always carry one on the property at night. It was dark. There was no light there, but a switch light with red on two sides and green on two. That light does not light up the place for reading purposes. The ordinary person can see on a dark night a fairly good distance. You can walk in the dark without a light. I walked down there without using the flashlight. After I got down there I used the flashlight for the examination I made. I had to do it with a flashlight. I had no tapeline or rule of any kind with me. I stepped off the distances. I did not make any other measurements than those I have told the jury.

The ground was level from the north rail of the Frisco tracks to a point approximately 8½ feet north thereof, where this ridge of cleanings had been thrown out from [fol. 132] the railroad tracks on both sides. There were no uneven places along there. East of the switch the ground was level there too. You had a railroad track to walk over if you walked parallel to the Frisco, but the ground north of the Frisco tracks was level and east of the Frisco tracks was level, a nice wide walkway there. That was not elevated above the tracks for about 8½ feet from the track, that is where the yard cleanings started. The switch that Haney was to throw was somewhere around four feet north of the north rail of the Frisco tracks at that place. The hangover of the train would come out about two feet north of the tracks, more or less. I did not distinguish the color of the blood on the cinders that night. I said there was something on the ground that looked like blood. I am not a chemist, I am a railroad man; I don't believe I could distinguish a spot of blood at night. The spot I saw could have been blood. I was there the next morning in daylight some time shortly after seven o'clock. There was no claim agent with me either that morning or the night before.

After I examined the place down there I returned and examined two cars of the train again. They were a baggage car and a mail car. I looked over both sides the same, I

examined the mail catchers. That is what is referred to here as the mail hook. Examining those was part of my duties as superintendent of terminals. In re-examining those cars I was not trying to find out if anything had struck Haney. We were looking for defects. We did not get a report that something sticking out from that train hit Haney. I am positive we did not. We made a second examination of the two cars (mail and baggage car) because it is a part of our duties, part of the duties of a superintendent when an injury occurs on property to make a thorough examination and it was done. That is the only reason in the world I had for the second examination. When I made the first examination after I had received the report of Haney being killed, I made a thorough examination [fol. 133] as far as I could go on it. There was no difference whatever between that examination and the one I made after I went down to the scene of the accident except that when we returned we tested out the mail catchers. We did not do that in the first place because the mail clerks were occupying the cars. We wanted to get the train moving. The mail car had side doors opening from the inside, and the baggage car had side doors opening from the inside on rollers. I couldn't give you the exact measurement of the height of the floor of a mail car or a baggage car, but I would probably say it is a little less than 5 feet high. I have not had occasion to measure one of those in years.

I said I went west of the Frisco switch and made an examination. I examined the rails, I examined the ties, I examined the walkway on the north side of the Frisco. I did not examine the rails and ties because anything indicated that a rail or tie had struck Haney. It was a course of procedure we were required to go through in connection with our duties when there is an accident and the responsibility has not been determined. Normally I do not make an examination of trains personally such as I did in this case unless there is some accident reported. If I am on a station platform and a train goes by, I look at the wheels and truck beams. That is force of habit, due to years of experience. If any passenger train came into that station, if there was anything that developed, I would take time to examine it in the station. In the course of a 24-hour day I would say that probably at least 25 trains passed through that station. As I said, my principal duty was to meet all Frisco trains, to expedite the loading of mail, express and

passengers, and give the trains personal supervision to keep them on time. I might say at that time I walked around equipment on practically every train that I had supervision over. During the evenings I examined all of the Frisco trains that came in there.

Part of the time I do that and the rest of the time I do [fol. 134] not. If there are any trains that have had trouble on the line I look them over. We make an inside inspection on all outbound equipment to see if the equipment is in order. When I am at the station I examine the trains in the station at the time I am there. I had others working under me performing those duties. The number varies. My best judgment is that there were at least five in December, 1939. In this instance I was alone in the round I made around train 106 the first time. The second examination I was attended by the car inspector Armand and coach foreman Drashman. In so far as the handling of trains is concerned, Drashman worked under my supervision. We issued instructions to mechanical people.

A few minutes after I learned of the accident, I talked to Drashman when I ran into him. Drashman did not tell me that he had heard some switchman or someone there at the scene of the accident say that something sticking out from the train hit Haney. Drashman has never told me that at any time. I would say I saw Drashman within five, ten or fifteen minutes after I heard that Haney had been injured. I didn't look at my watch. Drashman walked to the scene of the accident with me, or what was reported to be the scene of the accident. As he walked with me to the scene of the accident he did not talk to me about his report of the accident. Drashman did not at any time discuss with me what he knew about the accident. He was with me when the two set-out cars at Memphis were examined. As far as train operation was concerned, I was his boss. If he learned anything about an accident of this kind I am satisfied he would report it to me, and he did not report anything.

I was in court yesterday part of the time when Drashman was testifying. I heard a part of his testimony; I was in and out and I didn't hear all of it. I was not in the courtroom and did not hear him testify that a man said some- [fol. 135] thing about something sticking out from the train and hitting Haney. I wasn't in the courtroom when any-

thing like that was said. I never at any time heard Drashman make any such statement.

I couldn't tell you just exactly when I saw any of the claim agents of either the Frisco Railroad or the Illinois Central after the accident happened. I think I saw Mr. Westbrook, the Frisco claim agent, the afternoon of December 22nd, and I believe it was several days before I saw Mr. Munson, who is the claim agent for the Illinois Central and the Y. & M. V.

As I was approaching that Frisco switch the night Haney was killed, I was governed by the switch light and paid no attention to the form of it and therefore I couldn't tell you how far I could see the form of the switch. I hesitate to make a guess because I did not pay any attention to the switch until I got to it. I saw the light as I approached. I had a report of Haney being injured somewhere near the switch. I did not look at the switch to see if I was approaching the proper place. I didn't have any occasion to, because the switch light was my direction in getting there. I was walking straight up to it. I wasn't hunting the switch in the dark; I didn't have any occasion to gauge any distance where I might be going, as far as that is concerned. I knew this switch had been there for years and I knew trains used that switch. As I went down there I assumed I knew where I was going; I found where he was hurt. I heard he was hurt around 14 feet from that switch. The report I obtained was from depot master McDonald. He didn't tell me it was 14 feet. We stepped it off where we saw a wet spot on the ground. I was in error when I said that the report I got was that he was hurt 14 feet from the switch. I got a report he was hurt on Broadway. When I first got the report that he was hurt on the Frisco switch was when I was down there hunting the spot. Broadway is shown right at the top of the map. [fol. 136] When we just took a recess for the lunch hour you had just asked me about Broadway, and I had pointed out to you that this place here south of the track (indicating on map) is Broadway. That is not down on the street; that is not used by pedestrians and vehicular traffic. That is not elevated over the streets. Broadway is on the street level. They put subways under there on the north and south side of the street, Broadway, through east and west. Where the Frisco train backed in as indicated on this map

as Broadway is not above the regular street level, but a subway was constructed and put in operation at Florida Street, which is west of that point, in 1937 and 1938. Vehicular traffic does not move east and west over this part of the map showing Broadway. Traffic does not move north and south on these railroad tracks. All that is pedestrians in there. I couldn't testify whether that is a public walk for pedestrians, because it has been going on over there ever since I have been there, where pedestrians are walking up and down Broadway all the time, walking up and down the grade on Broadway. Only the pedestrians use the railroad track as a walkway. I might add that is a city street; it was franchised out to the railroad for railroad purposes, and pedestrians apparently, or at least during my time in Memphis, have not been shut off from there. It is not thoroughly policed to stop pedestrians going up and down Broadway. Automobiles never drive east and west over the railroad tracks, or north and south on the tracks, other than a railroad vehicle or type of automobile. Broadway runs east and west, and east and west is where the bulk of pedestrians travel. They walk east and west over the railroad tracks close to the shanty. They walk there regularly, a number of them, both day and night. When I was in the management of the Frisco Railroad I was there at least four or five times a week or oftener. I left there in October, 1942. There is no other track for the Frisco to back in on as it did that [fol. 137] night from the west, other than this track that it was backing in on at the time Mr. Haney was killed. The trains are also backed in from the east, around the other way, when they are pulled out.

I knew Lyman Elmer Haney during his lifetime. He had nothing to do with the mechanism of that Frisco train 106, the upkeep of it or examination of it. That was under the control of the engineer and conductor and the balance of the train crew that was operating at the time.

By Mr. Skinker: I want to formally introduce into evidence the Grand Central contract of 1934, which has been identified as Frisco Trustees' Exhibit E, and further identified by the witness Young; and also to formally introduce in evidence at this time Defendants Frisco Trustees' Exhibit F, which is the letter contract of April 18, 1935, iden-

tified by the witness Young. Said documents are respectively as follows:

(For contract see p. 20; for map attached see opposite p. 102.)

DONALD WILLARD SCOTT, being duly sworn, on the part of defendants testified as follows:

My name is Donald Willard Scott; I live at Memphis, Tenn.; am a pipe fitter, now employed by Chicasaw Ordnance Works. In December, 1939, I was employed by the Crane Company, at its warehouse at 725 Florida Avenue, north of the Frisco tracks. I was present when a colored fellow working there picked up a pocketbook on the 27th day of December, 1939, in the morning just as we were coming to work, somewhere around 9 o'clock. The pocketbook was picked up in my presence and I opened it myself. It had in it a Social Security card, a Brotherhood card, a two-year pass with the Illinois Central Railroad System, and the name Haney was on the papers. There [fol. 138] was no money in the pocket book. It was a little brown genuine leather billfold that had a place for cards and a place to put currency. There was no currency or money of any kind in the billfold. It was found on a two-by-four inside of a solid fence made of boards about seven-eighths inches thick and 8 feet high. The fence was right at the edge of the sidewalk, a roof extended out over it, and it was about 2 feet below the top of the fence. After I saw the name on the papers I said: "That name is familiar." I grabbed the telephone and called the telephone number I found in the book for that name, but I got no answer. I then called my superintendent and gave the pocketbook to him and he gave it to the police department. I have never seen it since that time.

Cross-examination.

By Mr. Edwards:

I saw in the paper that Mr. Haney had been injured down on the track. There was a gate in the fence that was open sometimes at certain hours of the day. Some days it might be open quite a long time and other days not at

all. The pocketbook was not soiled at all and appeared to be perfect. It did not appear to have been lying out in the rain or snow.

There was a four-foot sidewalk right east and in front of the fence on which this pocketbook was found, and Florida Street was right in front of that, east of it.

When I found the pocketbook I looked in the telephone book and found the number of the name of the party whose name was on the papers. I called the number twice, but got no answer. The colored man who found the pocketbook in my presence was Chester Green. He lives in North Memphis, but I couldn't give his address.

I came to St. Louis riding on a pass on the Frisco Railroad and that railroad is paying my time while I am up here. The Illinois Central has nothing to do with the arrangement.

[fol. 139] Redirect examination.

By Mr. Skinker:

I would say that the brace on which the pocketbook was found was about 5 feet 10 inches or maybe 6 feet above the ground and about 2 feet below the top of the fence, on the inside of the fence.

Further cross-examination.

By Mr. Edwards:

The pocketbook was found within four feet of the gate.

G. W. CREAGH, being duly sworn on the part of the defendants, testified as follows:

My name is G. W. Creagh. I live at 233 North Willett Ave., Memphis, Tenn., and am employed by the Frisco Railroad as passenger train conductor and have been such conductor for 30 years.

I was passenger conductor on train 106 that came from the South into Memphis on the evening of Dec. 21, 1939. I got on that train at Birmingham which was the point of origin of the train.

My record shows that that train arrived in Memphis at 7:25 on the evening of Dec. 21, 1939. We were due to ar-

rive there at 6:55, so we were 30 minutes late. Coming into Memphis that train travels west and has to cross the I. C. main line. I recall that the train stopped at that main line that evening. We then got a signal to proceed west, and the train pulled on up west of what is called a wye switch where we back into the Grand Central station. It is my duty to be on the rear of the train coming into Memphis, and I was there at that time. I was there when it passed the wye switch. I had an air valve by which I could control the automatic air on the train and stop it or slacken its speed. That was independent of the engineer. That is the ordinary procedure for a conductor backing [fol. 140] into the station, he operates the air from the back end of the train.

There is a separate device by which he transmits signals to the engineer, called a whistle signal; it is operated by a bell cord above the conductor's head. It was my duty to notify the engineer when the back end of my train had passed west of that switch where I wanted to stop and I notified him by two blasts of the whistle. That means stop. He stopped, 20 to 30 feet west of the switch we used to back into the station. We were then prepared to back in in an easterly direction and around the curve in a northwardly direction into the Grand Central Station. That was the regular nightly procedure every time I was on that train. I saw Mr. Haney after we came up there and stopped and he lined that switch for us so we could go back into the track that takes us up into the station, off of the main line and around the curve into the station. I saw the switch tender line that switch, I didn't know Haney personally, but I saw the switch tender that was usually there do that. I spoke to him just like I would speak to anybody in passing. After he lined the switch for us, the switch light on there was red. The switch tender then crossed over to the south side of the track opposite the switch that he had lined. He came across the track just the least bit to the southeast of the switch stand. We backed up in a very few seconds after he had crossed over. I did not see Haney after that. The last I saw of him he was standing south of the track in good clearance. He was on the fireman's side as we were backing up into the depot. The fireman was Willie Ryan. He is dead. After Haney had crossed over to the south side of the track I gave the engineer a signal to start backing. He responded

to it with two blasts of the whistle. That is in compliance with an air brake test we make before we back up. We made that test on that occasion. It consists in drawing up enough air out of the back end of the back-up hose to [fol. 141] know that the brakes are working, taking hold. We do not have to completely stop the train in order to do that. We started backing in there. I gave it that air brake test and did not completely stop the train. We proceeded then backing in in an easterly direction; the track then veers to the left or north as we go around coming into the station. I remained on the back end of the train in control of that air all the way into the Grand Central station. We stopped to clear the I. C. tracks which are the north and southbound tracks. In backing into the station, we had to cross over the I. C. main line and on the movement into the depot we were stopped on account of something on the I. C. track. I got the signal to stop from a switch tender and from my brakeman, Stubbs. I acted on that signal and stopped the train myself with that air hose. I later got a signal to proceed and then went on back into the station without further stop.

That train was what we call a vestibuled door train, a modern type train having what we ordinarily understand to be vestibule doors on both the Pullmans and the day coaches.

I do not know of any way for a person on the south side of my train as Haney was, as I started back, to get over to the north side while the train was backing up there or while it was stopped. He didn't have any way to get through that I know of. I do not know of any reason in my railroad experience for him to cross over there, or attempt to cross over through that train. I do not know of any way he could have crossed through that train when we were backing in.

As conductor of that train I was the superior officer and in charge of it, responsible for its safety and in charge of the train. That is true in railroad circles everywhere. On the trip from Birmingham at the stop before we got to Memphis, I got off on the platform and went as far as the baggage cars back and forth along the side of the train. [fol. 142] At every station where we stopped I was up to the baggage car, not the full length of the train. I found no condition about the train that was out of the ordinary. Everything so far as I was able to tell was in good condi-

tion on the entire trip and no report was made by me of anything out of the ordinary.

Memphis was the end of my run and I left the train at Memphis and it was turned over to another conductor.

Cross-examination.

By Mr. Gentry:

After the switch was set properly, the switch tender, who was Mr. Haney, crossed the track and the last I saw of him was when he was on that side. For many years it has been the rule in the transportation book of rules for a switchman when he throws a switch like that to cross over the track before the train moves up. That is a safety regulation to prevent the switch tender from inadvertently throwing the switch before the train is completely in the clear. Mr. Haney complied with the rule on that occasion and did what switchmen customarily do.

Redirect examination.

By Mr. Skinker:

I have a distinct recollection of Mr. Haney moving over to the south side on that particular occasion, the night of Dec. 21, 1939.

Cross-examination.

By Mr. Edwards:

I talked to Mrs. Haney, the widow, once after the accident. She came to my house and I told her what happened as near as I could. I did not tell her that I didn't know whether her husband got on the train and rode from the shanty down to the switch. I did not tell her that my flagman, Stubbs, said he did but that I could not remember. Stubbs did not tell me that he saw him get on the train at the shanty and ride down to the switch. Mr. Haney did [fol. 143] not get on that train and ride down to the switch and get off. I did not stop that train near Mr. Haney's shanty; I stopped clear of the I. C. main line. When the back of my train passed Mr. Haney's shanty, it was just moving. We had just started and moved about 20' or 30 feet with 12 cars. No one swung on that train and rode

down to the switch, I don't know the distance from Haney's shanty down to the switch. I would not say it was as much as two city blocks and I would not say it is more than 100 feet. I don't know; I didn't ever measure it; I haven't got any judgments on things like that unless I had the actual measurement. The switch tender did not have a custom of swinging on my train and riding down to that switch. He might have done it once in a while, but I wouldn't pretend to say how many times. I did not tell Mrs. Haney that her husband swung on the back end of the train and that as we were riding up to this switch we talked about Christmas. I did not tell her that I had just been sick and couldn't remember which side of the switch her husband was on. I did not have any conversation similar to that. I told her her husband was on the south side of the tracks when I last saw him and I didn't say anything about the north side.

When my train passed over the switch that Haney had opened it was running about four miles an hour. We got going faster than that after we were backing into the depot, probably five or six miles an hour, but not faster. I don't know how far that switch is from the depot. Mrs. Haney did not ask me to give her a written statement. I had not been sick just before she called to see me. I had been on this particular run about 20 years; I don't know exactly how long I had seen Haney there; I didn't know Haney. I knew he was the switch tender, because it was night I couldn't tell you who he was. I always spoke to him and he would speak to me. I don't remember whether it was too dark to see his features but I wouldn't have [fol. 144] known whether it was him or not, because I didn't know him. I don't know what his next duty was after we backed the train into the station. Switch tenders do not come under my supervision, and I don't know what their duties are. I still work for the Frisco Railroad.

The last stop before we got to Memphis was Holly Springs, 45 miles from Memphis. I don't know how large the town is. Sometimes we have quite a few passengers getting on there, then again we don't have anybody. I don't know how many we had that night or whether we had any getting off there. I know we stopped there because it is a regular stop and we had to stop there to deliver mail and express. I did not walk the entire length of that train at that place. I did not at any time

on that trip at one place walk the entire length from the head of the train to the back end. I would go part one time and part another. We have inspectors inspecting the trains at all terminals. I don't attempt to do that. The side doors of the baggage car and mail car were opened at the depots to load mail and such as that. I couldn't say about taking baggage on and off but we did take mail on. The first time I saw Haney he was, I suppose, about ten feet from me. I could not see how he was dressed, as there was no artificial light around there. I could not see whether he had any badge on his cap or coat when he was 20 feet away from me. He had an electric lantern for signal purposes and to make a light too. It was a white lantern. I couldn't see whether Haney was wearing a hat or a cap because I didn't pay any attention to what he had on his head nor did I see whether he had any pistol on him. The station was located on the fireman's side. The last stop we made where the station was on the right side of the train was at Tupelo, Mississippi, 105 miles from Memphis. There I looked at only two or three cars as I went by discharging my duty. I mean two or three cars from the head end. We had three baggage cars and one mail car [fol. 145] and the rest of the cars were Pullmans, chair cars and dining car. Stubbs was my rear brakeman. He dropped off of that train at the I. C. main line. That plat is a Chinese puzzle to me. I don't recognize it generally as a drawing of the place there at the scene of the accident. Stubbs' duty was to drop off at the I. C. tracks crossing and go around the curve where we backed in there to see that we backed into nobody and to hold any traffic that might be coming down, stop it from going across there while we were backing. I made a statement to the claim agent. I don't remember the date of it but it was a short time after the accident. Since then I have discussed the matter with Mr. Westbrook, a claim agent for the Frisco Railroad, since I came to St. Louis. I have not discussed it with the I. C. claim agent. All I gave the claim agent for the Frisco was the date of the train and what happened on our trip and I told you all that I told Mr. Westbrook.


J. E. MEE, being duly sworn on the part of the defendants, testified as follows:

Direct examination.

By Mr. Skinker:

My name is J. E. Mee. I reside at Memphis, Tennessee, and am employed by the Frisco Railroad as locomotive engineer and have been so employed as engineer for the Frisco about 38 years. I operate a locomotive on passenger trains. I was locomotive engineer on train 106 between Birmingham to Memphis on the evening of December 21, 1939. I got on my engine at Amory, Mississippi, which is a division point for engine men. I took the same engine on through from that point to Memphis. We had 12 cars in the train. The mail and baggage cars were next to the engine behind the tender and we had coaches and sleepers behind them. I remember that when we got to the I. C. main line in Memphis [fol. 146] the lights were against me and I stopped my train at that point. In coming into Memphis we were actually traveling to the west. After the green light came on at the I. C. crossing, we proceeded on west past the wye switch until the conductor pulled me down. I expected to get a signal from him when the back end cleared the wye switch, which is the switch where we were to back into the union station. I got a signal from the conductor to stop the train and I stopped up at Kentucky street. There is a shanty there about five or six feet from the track and on the north side of it. There are two switch tenders up there at Kentucky street. We went the length of three cars and a locomotive beyond that shanty at Kentucky, and stopped on a signal from the conductor on the rear end of the train. I got a blast of three whistles on the air from the conductor to start backing up. I couldn't see the back end of the train from my position in the cab because of a curve. As I went in there going west, my engineer's seat was on the right side of the cab, which would be the north side. In starting the backward movement I always looked back at the movement of the train, turned and faced the rear end, in the direction we were going, and watched the movement of the train. That is my duty, to look down to the back and alongside my train as I start backing. We lean out of the window to do that. It is up to the engineer whether he leans out the side or looks

through the rear vision window. The first cars I was looking at would be the mail and baggage cars, and I was looking back along the north side of them and as far back as I could see. As we made that backward movement the conductor controlled the air brake on the train from the rear end of the train. We stopped the train on that occasion before we got into the station and, with his signal which I had to get from him before I could move, I started again. I could see nothing of the rear end. It was on the curve and out of sight. After stopping and getting his signal to proceed, I backed on clear into the station. We were stopped only one time after we started the backing movement over the switch. I am familiar with that wye switch that lets my train go in there. I did not see Haney or any person at that switch as I approached it and passed it. I didn't see any person lying on the ground or standing up there or anybody at all near the side of my train. I did not see anybody up around close to the side of the train at any time throughout the backing movement, clear on into the station. I was at all times looking out of my window toward the rear past the side of the mail and baggage cars at the head of the train. I was backing around the curve to the left and north and upgrade. It takes more power to back up around a curve than on a straight track, and in addition to the curve we were backing upgrade. We were going approximately 8 miles an hour before I got the signal to stop. When we start back onto such a curve the conductor gives an air brake test and our answer is two blasts of the whistle. That is the running test which he makes with the train in motion. The idea is to see if the brakes hold and if he has got good control of them. The test was made on that occasion.

Cross-examination. 

By Mr. Gentry:

I didn't see anyone there on the north side of the track as we passed that wye switch and I did not see any lantern or electric light there. I have been railroading a great many years and I am pretty familiar with the practices of switchmen. Rule 104 instructs switchmen when they throw such a switch as that wye switch to go to the opposite side of the track. They have had accidents where they stand at the switch. That is a safety measure so that the man wouldn't

throw the switch as they are backing in and that has been observed many years. That would put the switchman on [fol. 148] the south side of the train as we passed. If he was injured on the north side, that was after our train got by.

Redirect examination.

By Mr. Skinker:

As I was backing this train in on that particular occasion and looked along the side of the train I did not observe any rod, mail arm or any instrument of any kind swinging out or protruding out from the side of my train.

Cross-examination.

By Mr. Edwards:

I have met Mrs. Haney. She never asked me to give her a statement of what I knew about this case. She came to my house and talked to me about it and asked me what I knew about it. I told her I didn't know absolutely nothing about it; in fact I didn't. I didn't have any statement to give her. I did not tell her it was against the rules to give her a written statement. I told her the claim agent would get the statement and if she wanted a copy of it it would be satisfactory to me. I might have told her that I gave it to the claim agent and that she could get it from him if he wanted to give it to her. I did not tell her our railroad forbid its employees to give statements to any but claim agents. I have never known the railroad to have anything to say about that.

The first I knew of the accident was reading about it in the paper the next morning.

The lower part of my window of my cab is about 8 or 9 feet above the rail. It is something like that. My head would be about 10 feet above the rail.

I didn't see any switch tender as I looked back, and I don't know whether there was any switch tender there or not. I did not pay any attention to the switch tenders at Kentucky street. I suppose they were in the shanty. I don't recall that I did. I saw one when he gave me a signal [fol. 149] to come across. I think I saw him when he gave me a signal to come over. He then went back to the

shanty. In backing up I wasn't looking for him. I was looking at the rear of the train. I wouldn't know whether I would have seen Haney or not if he had been there. It is possible there could have been somebody lying there and that I wouldn't see them. It is likely I would not have seen him. I don't think there was an electric light there at that particular switch. I never paid any attention to it. I never looked down at the ground. I looked back as far as I could see the rear end and watched the gauges on the engine. I don't know anything about whether Haney was lying there at that switch when I passed or not. I didn't see him there. The headlight was on the engine until we got up in the yard and cut it out, but I never looked that way. When I am backing up I never look that way; I never look west; I look back to keep my eye on the movement of the train. From the time I got my signal to back up until the time I backed up into the station I never looked back towards the front of the engine.

As I backed in when the conductor stopped me the first time the switch engine had him blocked and he stopped me. My train was about 1,000 or 1,100 feet long, having 12 cars and an engine and tender. The mail car was next to the tender and next to the mail car were the baggage and express cars. I didn't have a list of cars. They okay the air to me at the terminal and tell me the number of cars and that they are all working. They don't tell me what cars they are.

After we passed the switch and the conductor pulled me down I know that the rear end of my train was west of that switch, and the front of it was then 1,100 feet or more west of the switch. I suppose we backed up about 300 feet or something like that when I was stopped. After that I got another signal to back up and I backed up and continued [fol. 150] backing on into the station. After I got moving I was going about eight miles an hour. Of course, we have to increase the speed a little bit around the curve, because it is a bad curve, and I suppose we would be going about ten miles an hour there. I don't think we could have been going any faster than that around a curve. After we get down near the station it is level ground. It was a level track from where I started backing up and we didn't get to going up-grade until we were right around that curve. If, as you tell me, you have just measured this map and that it indicates

that from that Frisco switch into the station is 2,700 feet; that sounds about right to me.

Q. In what distance could you stop that train, with safety to yourself and the passengers, going eight miles an hour on a track such as this you were backing in on and conditions such as those?

By Mr. Skinker: We object to that because there is no issue of that kind made by the pleadings; there is no charge that Mr. Haney was seen or could have been seen and they could have stopped the train after seeing him; no issue of that kind made in this case. The sole charge is that some protrusion from the train hit him.

By Mr. Gentry: I make the same objection. It is not pleaded that anybody was guilty of negligence in not stopping the train.

By Mr. Edwards: That is part of the case; they didn't stop it; they didn't remove it; they could stop it and remove it.

By Mr. Skinker: Remove what?

By Mr. Edwards: That is part of the negligence.

By Mr. Gentry: The negligence is specifically pleaded and that isn't pleaded.

By Mr. Edwards: That you negligently had something sticking out from this train and hit this man; that your clients didn't furnish him a safe place to work; that is the charge in this case.

[fol. 151] By the Court: It is cross-examination; the witness may answer.

To which ruling of the court the defendants, and each of them, by their counsel, duly excepted and still continue to except.

A. You can stop within a little over 100 feet.

Q. That would be going eight miles an hour?

A. Yes, sir.

Q. Take the same question going ten miles an hour, in what distance could you stop it?

By Mr. Skinker: We renew our objection.

By Mr. Gentry: Renew it for the Illinois Central.

By the Court: Objection overruled.

To which ruling of the Court the defendants and each of them, by their counsel, then and there duly excepted and still continue to except.

A. I have never made no test.

Q. That is 2 miles faster than 8 miles?

A. That is getting pretty close. I haven't studied it that close. I am a pretty good judge of speed, but I haven't studied it that close.

Q. Do you think you could stop it in the same distance going 10 miles an hour that you could going 8?

A. I think so.

Q. About the same?

A. Yes, sir.

When a switch tender lines a switch like that he is supposed to go to the opposite side of the switch according to Rule 104. I don't know the switch tender's duties. After we clear the switch his next duty is to throw the switch back immediately, and that is what they usually do. On our railroad I never saw the switch tenders stand alongside the switch as we backed in on other occasions.

I don't know what the condition of the lights about the wye switch was. I didn't see any artificial light over the switch or near the switch. Train 106 was about 40 minutes late in Memphis that evening. It was due there at 6:50 [fol. 152] and arrived about 7:30. I couldn't say how far away I could see a rod about 2½ inches in diameter at that time. I couldn't say whether I could see it as much as 50 feet away or not.

I am still running on that Frisco train. My train backs around the curve by that Stratten warehouse. Outside of that there are two buildings from that wye switch to the switchman's stand. The warehouse is north and northwest as you back around the wye.

C. J. Brusco, being recalled for further examination by defendants, testified as follows:

Direct examination.

By Mr. Gentry:

I am a member of the Brotherhood of Railway Trainmen and my lodge membership is held in the Chickasaw Lodge 347 in Memphis, Tenn. Each lodge has an individual name and number. There is another lodge of that order, known as Lodge 489, in Memphis. In the lodge that I belong to there were Illinois Central men, Yazoo & Mississippi Valley men, N. C. & St. L. men and Rock Island men. They were all employees who had duties about the yards. Lodge No. 489 consisted of Frisco and Missouri Pacific men. The Illinois Central and the Y. & M. V. have a road lodge separate from the yard lodge. All of those lodges were a part of the same brotherhood. I have belonged to Chickasaw Lodge since 1914. I understood Mr. Haney was a member of that same lodge. When anybody paid his dues in any of those lodges they issued a monthly receipt with the year and the month on it. The dues were paid once a month. They give you a button with the month and year on it if you want it, and if you don't want it you don't have to take it. A great many employees wear those buttons on their caps or hats. I saw a great many of them in and about the [fol. 153] yards wearing them. Yesterday I identified the button that is marked Exhibit 2 for Illinois Central Railroad Company. I never saw any employee from any lodge or who worked for any railroad that wore one of those buttons that had the name of any railroad whatever on it. They are issued by the lodge, the Brotherhood of Railroad Trainmen. All of the employees of the railroad, and as far as I know other roads were required to study rules designated as the "Uniform Code of Operating Rules." They examine you every four years on the rules. When a new man comes on he is instructed and examined. In the larger railroads, such as the Frisco System, the Illinois Central System, the same rules are in force. The rules require that when a man throws a switch, no matter whether he is called a switchman or a switch tender, and the train is standing and waiting for him to throw the switch, to step over the other side of the track or 20 feet away from the

switch; whether he does one or the other depends on the conditions when you line the switch.

Cross-examination.

By Mr. Edwards:

I remember testifying that Haney's next duty was to close the switch immediately after the train had cleared it, and his duty then was to return to the shanty and turn this light over the shanty so that those engines headed north could go across the tracks. That is true.

Thereupon defendants Frisco Trustees rested their case.

[fol. 154] **JOHN ROBERT BURNS**, being duly sworn, on the part of the defendant Illinois Central Railroad Company, testified as follows:

Direct examination.

By Mr. Gentry:

My name is John Robert Burns; I am 58 years old; am married, and live in Memphis, Tenn.; am employed by the Yazoo & Mississippi Valley Railroad Company and have been employed by it 32 years. That railroad has an office in the I. C. station at Memphis. I am trainmaster with that road and have been trainmaster since 1927. Before that I was chief clerk for the Yazoo & Mississippi Valley Railroad Company. Before that I used to be with the Frisco, in various jobs, in the transportation department. Most of my work has been office work. I have never been a switchman or an engineer.

As trainmaster for the Yazoo & Mississippi Valley Railroad Company in 1939 and prior to that I hired all the men in train and yard service of the Yazoo & Mississippi Valley Railroad Company, such as engine men, switchmen and switch tenders, and I would examine all of them. As trainmaster for the Yazoo & Mississippi Valley Railroad Company I did not employ Elmer Haney, whose death is in question here, but he worked under me. I had supervisory duties over him and he was under my orders. I know of my own knowledge that he was employed by the Yazoo & Mississippi Valley Railroad Company and devoted all his

time to the service of that company. Twice before his death a question came up which was discussed with him as the result of a physical examination he had made. Every four years men are re-examined physically and also on the rules and regulations. It was my duty to examine Haney on the rules along with the others, and I did examine him on that subject. I learned of a report that had been made by the examining physician as to the physical condition of [fol. 155] Haney, and as a result of that report I had a conversation with Haney. As the result of that report I had to take him out of service and did take him out of service. As a result of my having to take him out of service, Haney came to me and I had a conversation with him regarding his health. I told Mr. Haney I would have to take him out of service because the doctor had decided that his health was such that it wasn't safe for him to work under the conditions; he had an organic heart trouble. I told him that. He said "All right." Then I suggested to him that he go to the Chicago general hospital for re-examination, if he wasn't satisfied with it. The first time he was off in 1934 he was off from February until the 30th of March. We arranged for him to go to the hospital in Chicago. We had to give him an order to go back up there. He brought back evidence that he had been there. Later I called Haney into the office and informed him we were going to let him go back to work, but I had to keep in close enough touch with him and observe him often enough to know whether his physical condition would permit him to continue in the service or not, and I did that. I told him he must take good care of himself, not use intoxicants and get his rest regularly and not let things excite him. He promised to do that. Every time I would see him I would talk to him about his health and observe him; that is what I had to do.

I told you I gave instructions on the rules and examined men on the rules. Those were the transportation rules and regulations. They were known as "Uniform Code and Operating Rules." They are uniform, they are standard rules adopted by all the railroads in the various classes, class 1 railroads especially, such railroads in which are the Frisco, Illinois Central and the Yazoo & Mississippi Valley. I can speak for the Frisco because I worked for them. I know about their rules. I know the rules are the same as

[fol. 156] ours, standard rules, and I am sure the Missouri Pacific also had the same standard rules.

Q. I show you a rule book of the Missouri Pacific Railroad Company and call attention to a rule designated in the rule book as Rule 104-a, which is divided into a number of paragraphs, and the part I address to your attention is the fourth paragraph, and I will ask you to look at that fourth paragraph and tell us whether or not that is the same that was in the rules that you taught to Mr. Haney and on which you examined him and which governed his operation as an employee of the Yazoo & Mississippi Valley Railroad Company?

A. Yes, sir, it is the same as ours. I saw it in your office this morning.

Mr. Gentry: I offer this fourth paragraph of this rule in evidence. It is as follows (reading): "When a main track switch has been set for a train, the person attending the switch must go to the opposite side of the main track and not return to the operating switch stand until the movement has been completed."

By the Witness: I taught Mr. Haney that rule and examined him on that rule and found that he was familiar with it.

Cross-examination.

By Mr. Edwards:

I said I was with the Yazoo & Mississippi Valley Railroad. Mr. Claude F. McDonald worked for the same road. He was the night station master. I think there was a Pattison that worked for the Missouri Pacific as yardmaster there. I don't know whether he was the man you refer to or not. I wouldn't say for sure whether I ever saw Frisco Exhibit F before or not. I know that contract was in existence. The Yazoo & Mississippi Valley Company's name is not mentioned in that contract because it isn't necessary. The contract is signed by William Atwell for the Illinois Central Railroad Company. He signed it on April 18, 1935, for the Illinois Central. That was to pay [fol. 157] two-twelfths of Mr. Haney's wages, the Frisco to pay it to the Illinois Central Railroad. I am familiar with most of the terms of the contract. Mr. Atwell who signed the contract as vice-president of the Illinois Central is an

officer of the Yazoo & Mississippi Valley Railroad also. He is an officer of the System; he has charge of the G. S. L., the Y. & M. V. and the I. C.

My office has always been there in that station and is there now.

Mr. Haney worked pretty regularly. I would have to check the time sheet to know if he worked every day.

I am not a physician and do not pretend to examine people physically. Every time I would see Haney since 1934 I would size him up. I would say I saw him a dozen times in the last year of his life. I would always try to see him at least once a month. I didn't lecture to him about his health, but I talked to him about it. I don't know how much time Haney lost from the first of January, 1935, to the date of his death.

Redirect examination.

By Mr. Gentry:

I have seen these lodge buttons on men's caps. I never saw any employee of any railroad down in Memphis wearing any button of the Brotherhood of Railroad Trainmen that had the name of the railroad on it, indicating the railroad that he was employed by.

Recross-examination.

By Mr. Edwards:

The hospital in Chicago that I referred to was an Illinois Central System Hospital. I go up there. I am a Y. & M. V. employee.

At this point the defendant Illinois Central Railroad Company rested its case.

[fol. 158] Plaintiff's Testimony in Rebuttal

ALVIN A. HANEY, being recalled, testified in behalf of plaintiff in rebuttal as follows:

Direct examination.

By Mr. Edwards:

I testified the other day that I went to the Frisco switch near where my father was killed that evening after I had gone to the hospital. I imagine it was around 8:30 or 9 o'clock when I arrived there. I saw some man there, but I do not know his name. He appeared to be dressed as a railroad man. It was so dark near that switch that I could not see a thing as large as a 3-inch pipe 25 feet away, and, of course, I could not see a 1-inch pipe as well as a 3-inch pipe. As well as I can remember, when I arrived there the light on the switch stand was green. I did not have a flashlight with me. Other parties there had a lantern. I did not see any blood there, it was too dark. The green light there did not throw out a light illuminating the place, it is not there for lighting purposes. I couldn't see the switch stand underneath the green light.

The next morning I went back there, first to my father's shanty and then to his switch. I went to his shanty to get his light and his belongings, his lantern, and then I went up to the switch. That was where I saw this spot of blood. I couldn't see it the night before.

I never heard of my father having heart trouble that I know of. I was married and lived only about a block away from there. The only time I knew him ever to lose any time was when he would lay off on payday, maybe go down to a show or something. I know nothing of my father having been affected with heart trouble. I did not hear of anything of that kind. If he ever went to the hospital in Chicago, I didn't know anything about it. We have relatives up [fol. 159] there and he had been up to see them several times. I don't remember of his being up there any length of time in 1934. He never lost a month of time straight from January, 1934, to his death, that I know of, on account of sickness.

MRS. JULIA B. HANEY, being recalled for further examination, testified in behalf of plaintiff in rebuttal as follows:

Direct Examination,

By Mr. Edwards.

I was on the witness stand a few days ago and was sworn. I never knew of my husband having been affected with any illness or sickness or heart trouble. I did not know of his going to the hospital in Chicago. We have a cousin in Chicago and we have been there several times.

After my husband was killed, I went to see Mr. Creagh, the conductor on the Frisco train. I asked him if he knew anything about Mr. Haney's being hurt and he told me that he didn't know anything about it, the only thing he knew was, knew he was there and threw the switch and he just spoke words something like good evening; he said that was about all he knew. Mr. Creagh said he had been sick and that his memory wasn't so good, that he didn't remember much about it. He said my husband rode with him up to the switch and then he jumped off there and talked about Christmas or the weather or something, he couldn't remember just exactly what it was, because he had been sick and he had just gotten back out on his run from being sick. He said his memory wasn't so good. He said he didn't remember anything about my husband going to the south side of the track; he didn't know where he was standing or anything about it; and he couldn't remember; he didn't see him afterwards.

I went to see Mr. Mee, the engineer, to find out what he knew. He didn't tell me anything. He said it was against [fol. 160] the rules of the railroad to give out any information about anything like that; I would have to go to the claim agent to find out what I could about it. He wouldn't tell me anything.

I went with you sometime in August, 1940, to see Mr. Bruso at his home and we met him in front of his house. He wouldn't tell me anything either, because he said he had made his statement to the railroad and I would have to go to the railroad and find out about it; he couldn't tell me anything about it. That is all he would tell me. I couldn't tell you how much my husband was off in the

last five years of his life, because he worked awful steady.

He would never be off, only if we would go to town on paydays, he might lay off. He did not drink intoxicating liquor, and never has.

Cross-Examination

By Mr. Gentry.

I do not remember that from the first of February to the 10th of March, in 1934, my husband was not working at all. I do not remember that on account of being laid off he went up to Chicago to see if he could get straightened out about his health in the hospital. I certainly don't know a thing about that at all: My husband did not tell me that on account of his health Mr. Burns had to let him out and he never told me that he went to the hospital in Chicago.

Mr. Brusco did not tell me anything about making a statement to the police.

Mr. Creagh did not tell me that he saw my husband close to the track at the switch and he did not tell me where my husband was standing.

Plaintiff rests.

Both sides rest.

And the above and foregoing was all the evidence offered in the case.

[fol. 161] (At this point at 11:20 o'clock A. M., the Court having duly admonished the jury touching their proper conduct while Court should not be in session, declared a recess until 2:00 o'clock P. M., of the same day, at which time all parties being present, further proceedings were had in the case at bar, to-wit:)

DEFENDANTS' ADMISSIONS

By Mr. Gentry (Out of the hearing of the jury): The defendant Illinois Central Railroad Company admits that on the 21st day of December, 1939, Lyman Elmer Haney died in the City of Memphis; that subsequently the plaintiff, Walter A. Lavender, was duly appointed Administrator de bonis non of the Estate of said Haney, has duly qualified as such and is now serving in such capacity and has full authority to bring this suit.

This defendant further admits that on the 21st day of December, 1939, and long prior thereto, and down to the present time, the defendant Illinois Central Railroad Company has been and is a railroad corporation duly organized under the laws of the State of Illinois and engaged in the business of operating railroad trains as a common carrier in Interstate Commerce, passing through many states of the Union.

This defendant, Illinois Central Railroad Company, further admits that train No. 106, which has been referred to in the evidence, as having passed over switch thrown by Mr. Haney on the evening of December 21, 1939, was a train that was coming from the State of Alabama, through the State of Tennessee and into the State of Missouri and was on said trip at said time.

By Mr. Skinner: Defendants Kurn and Thompson admit they are the duly qualified trustees of the St. Louis-San Francisco Railway Company and they are now engaged in the railroad business in interstate commerce, and were on December 21, 1939; that Walter Lavender was appointed as Administrator de bonis non, has the letters of, and is Administrator de bonis non at the present time.

[fol. 162] Thereupon, the defendants, J. M. Kurn and Frank A. Thompson, trustees of the St. Louis-San Francisco Railway Company, debtor, presented to the Court in writing and prayed the Court to give and read to the jury a peremptory instruction in the nature of a demurrer, in words and figures as follows:

MOTIONS FOR DIRECTED VERDICT

"Now at the close of all of the evidence in the case, the Court instructs the jury that under the law and the evidence, plaintiff is not entitled to recover against defendants J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, and your verdict should be for said defendants."

Which said instruction the Court refused to give.

To which action of the Court in so overruling the said instruction, the defendants, and each of them, by their counsel, then and there duly excepted and still continue to except.

Thereupon, the Illinois Central Railroad Company presented to the Court in writing and prayed the Court to give and read to the jury a peremptory instruction, in words and figures as follows:

"At the close of all the evidence offered in the case, the Court instructs the jury that, under the pleadings and the evidence, the plaintiff is not entitled to recover against the defendant, the Illinois Central Railroad Company, and your verdict must be in favor of the said defendant."

Which said instruction the Court refused to give.

To which action of the Court in so refusing to give and read to the jury the said instruction, the defendants, and each of them, by their counsel, then and there duly excepted and still continue to except.

[fol. 163] PLAINTIFF'S INSTRUCTIONS GIVEN

Thereupon the plaintiff presented to the Court in writing, and prayed the Court to give and read to the jury, and the Court did give and read to the jury, instructions in words and figures as follows, to-wit:

"Instruction No. 1

"The Court instructs the jury that before you can find a verdict for plaintiff and against defendants, J. M. Kurn and Frank A. Thompson, trustees for the St. Louis-San Francisco Railway Company, debtor, under instruction No. 2, given you herein, you must first find and believe from the evidence that Walter A. Lavender is now the duly appointed, qualified and acting administrator, de bonis non, of the estate of Lyman Elmer Haney, deceased, who died on December 21, 1939, and that J. M. Kurn and Frank A. Thompson are the duly appointing and acting trustees of the St. Louis-San Francisco Railway Company, debtor, a corporation operating a railroad as a common carrier by railroad, and that on the 21st day of December, 1939, said Lyman Elmer Haney died leaving surviving him a widow, Julia Haney and Alvin Haney, a son, and Margie Linson, a daughter, children;

You must further find and believe from the evidence that said defendants at said time were operating the St. Louis-San Francisco Railway Company, mentioned in the evi-

dence, as a common carrier by railroad, and as such, was at the time Lyman Elmer Haney was injured and killed engaged in commerce between the state of Alabama and the state of Tennessee, and that said Lyman Elmer Haney at the time he was injured was the servant of said defendants and working and acting within the scope of his employment as such; that said Lyman Elmer Haney and said defendants at the time he was injured were engaged in running and [fol. 164] operating the Frisco passenger train mentioned in the evidence and that said passenger train was on its run from Birmingham, Alabama, to Memphis, Tennessee;

And you must further find that both said defendants and Lyman Elmer Haney at the time he was injured were engaged in interstate commerce."

"Instruction No. 2

"The Court instructs the jury that if you find and believe from the evidence that Lyman Elmer Haney at all the times mentioned in the evidence was an agent and servant of the defendants, J. M. Kurn and Frank A. Thompson working in the line of his duties and within the scope of his employment at the time he was injured and killed;

And if you further find and believe from the evidence that on or about December 21, 1939, said Lyman Elmer Haney while working in the line of his duties as a servant of said defendants in the yards of the Grand Central Depot at Memphis, Tennessee, at the place mentioned in the evidence, opened or lined a switch so that the said defendants could back their passenger train over said switch and into said Grand Central Depot at Memphis, Tennessee;

And if you further find that said Lyman Elmer Haney's duty was to remain at or near said switch and close or reline said switch after the defendants' Frisco passenger train had backed into said Grand Central Station and cleared said switch;

And if you further find that said Lyman Elmer Haney after opening or lining said switch did stand at or near said switch in the clearance of said defendants' Frisco passenger train waiting for defendants' said passenger train to back into said station and clear said switch;

And if you further find that while said Lyman Elmer Haney was so standing at or near said switch and the defendants' passenger train was backing past him

that a rod or other object projecting or swinging out beyond the side of said passenger train struck said Lyman Elmer Haney with great force and violence as defendants' train backed past said Lyman Elmer Haney and did thereby knock him to the ground and injure and kill said Lyman Elmer Haney;

And if you also find and believe from the evidence that the defendants and their servants in charge of and operating said passenger train knew of, or, by the exercise of ordinary care could have known, that a rod or other object was extending, projecting or swinging out beyond the side of said passenger train, if you so find there was a rod or other object extending, projecting or swinging out beyond the side of said passenger train, in time to have removed the same before passing the place where Lyman Elmer Haney was standing;

And if you further find that said defendants knew, or by the exercise of ordinary care could have known that if said rod or other object, if any, was permitted to extend, swing out or project beyond the side of their said passenger train, if any, as it passed said Haney that it was liable to strike and injure Lyman Elmer Haney as said train backed past him, and if you further find that the said defendants knew, or by the exercise of ordinary care could have known of said danger, if any, in time to remove same but negligently failed to remove said rod or other object extending, swinging out or projecting beyond the side of said train, if any, before it passed Lyman Elmer Haney and if you also find that such failure on the part of said defendants, if any, constituted negligence and that as a direct result of such negligence said Lyman Elmer Haney was injured and killed, then you will find for plaintiff and against said defendants, J. M. Kurn and Frank A. Thompson, Trustees for the St. Louis-San Francisco Railway Company, debtor."

[fol. 166]

"Instruction No. 3

The Court instructs the jury that before you can find a verdict for plaintiff and against defendant, Illinois Central Railroad, under instruction No. 4 given you herein, you must first find and believe from the evidence that Walter A. Lavender is now the duly appointed, qualified and acting administrator de bonis non of the estate of Lyman Elmer Haney, deceased, who died on December 21, 1939, and that

the Illinois Central Railroad is a corporation operating a railroad as a common carrier by railroad, and that on the 21st day of December, 1939, said Lyman Elmer Haney died leaving surviving him a widow, Julia Haney, and Alvin Haney, a son, and Margie Linson, a daughter, children;

You must further find and believe from the evidence that said defendant at said time was operating the Illinois Central Railroad Company, mentioned in the evidence, as a common carrier by railroad, and as such, was at the time Lyman Elmer Haney was injured and killed engaged in commerce between the state of Alabama and the state of Tennessee, and that said Lyman Elmer Haney at the time he was injured was the servant of said defendant and working and acting within the scope of his employment as such; that said Lyman Elmer Haney and said defendant at the time he was injured were engaged in running and operating the Frisco passenger train mentioned in the evidence and that said passenger train was on its run from Birmingham, Alabama, to Memphis, Tennessee;

And you must further find that both said defendant and Lyman Elmer Haney at the time he was injured were engaged in interstate commerce."

"Instruction No. 4

The Court instructs the jury that if you find and believe from the evidence that Lyman Elmer Haney at all the times mentioned in the evidence was an agent and servant of the [fol. 167] defendant, Illinois Central Railroad Company, working in the line of his duties and within the scope of his employment at the time he was injured and killed, then the Court instructs the jury that it became and was the duty of the defendant, Illinois Central Railroad Company, to exercise ordinary care to furnish Lyman Elmer Haney a reasonably safe place in which to do the work required of said Haney as the servant of said Illinois Central Railroad and to exercise ordinary care to keep and maintain the place where Lyman Elmer Haney was so required to work reasonably safe;

And if you further find and believe from the evidence that on or about December 21, 1939, said Lyman Elmer Haney, while working in the line of his duties as a servant of defendant, Illinois Central Railroad Company, in the railroad yards at Memphis, Tennessee, at the place men-

tioned in the evidence, opened or lined a switch so that a Frisco passenger train could be backed over the switch into the Grand Central depot at Memphis, Tennessee;

And if you further find that said Lyman Elmer Haney's duties as a servant of the Illinois Central Railroad Company required that he remain at or near said switch and close or reline said switch after the said Frisco passenger train had backed into said Grand Central depot and cleared said switch;

And if you further find and believe from the evidence that at the place where said Haney was required to work, if you so find, the ground was high and uneven and the light was insufficient and inadequate, and if you find that said condition, if any, of the place where Haney was required to work was by reason thereof unsafe and dangerous, if you so find, and that the defendant, Illinois Central Railroad, and its servants failed to exercise ordinary care to make said place reasonably safe, and if you also find and believe that such failure on the part of defendant, Illinois Central Railroad, if any, constituted negligence; and that [fol. 168] said Lyman Elmer Haney was injured and killed as a direct result of said place being unsafe and dangerous, if any, then you will find for the plaintiff and against the defendant, Illinois Central Railroad."

"Instruction No. 5

The jury are instructed that you are the sole judge of the credibility of the witnesses and of the weight to be given to their testimony. In determining such credibility and weight you may take into consideration the manner of the witness on the stand, his or her interest, if any, in the result of the trial, his or her relation to or feeling towards the parties to the suit, the probability or improbability of his or her statements, as well as all the other facts and circumstances given in evidence. In this connection you are further instructed that if you believe that any witness has knowingly or wilfully sworn falsely to any fact or facts material to the issues in this case, you are at liberty to reject all or any portion of such witness' testimony."

"Instruction No. 8

The Court instructs the jury that if you find for the plaintiff under the other instructions given you, you will

assess the damages in such sum as you may find and believe from the evidence is the present cash value of the future pecuniary benefit, if any, of which the widow, Julia Haney, is deprived by the death of Lyman Elmer Haney, according to the circumstances in evidence, making adequate allowance for the earning power of money, the sum you assess as damages being the aggregate amount of such sums as you may find such beneficiary is deprived, as herein set out."

To which action of the Court in so giving and reading to the jury the said instructions, and each of them, the defendants, and each of them, by their counsel, then and there duly excepted, and still continues to except.

[fol. 169] DEFENDANTS' GIVEN INSTRUCTIONS

Thereupon the defendants Illinois Central Railroad and J. M. Kurn and Frank A. Thompson, Trustees of the St. Louis-San Francisco Railway Company, Debtor, presented to the Court in writing and prayed the Court to give and read to the jury, and the Court did give and read to the jury, instructions in words and figures as follows, to-wit:

"Instruction No. 6

If the jury find from the evidence that after Haney threw the switch which permitted Frisco train No. 106 while backing to the east to leave the main track and go onto the switch track leading to the station in Memphis, he crossed over from the north side of said switch track to the south side thereof, and was last seen on that side as the east end of the train passed him, backing toward said station; and if the jury further find that sometime after said train had passed over said switch Haney was found unconscious at a point north of said switch or main track, then plaintiff is not entitled to recover, and your verdict must be in favor of both defendants."

The Court then gave to the jury, at the request of the defendant Illinois Central Railroad Company the following instruction No. 7:

"Instruction No. 7

If the jury find from the evidence that the deceased Haney was employed by the Yazoo & Mississippi Valley

Railroad Company and not by the Illinois Central Railroad Company, then the plaintiff is not entitled to recover against the defendant Illinois Central Railroad Company and your verdict must be in favor of said defendant."

[fol. 170] INSTRUCTION GIVEN BY THE COURT OF ITS OWN
MOTION

Thereupon the Court, of its own motion, gave and read to the jury an instruction in words and figures as follows:

"The Court instructs the jury that nine of your number have the power to find and return a verdict, and if less than the whole of your number but as many as nine, agree upon a verdict, the same should be returned as the verdict of the Jury, in which event all of the Jurors who concur in such verdict shall sign the same.

If, however, all of the Jurors concur in a verdict, your foreman alone may sign it."

DEFENDANT ILLINOIS CENTRAL INSTRUCTION REFUSED

Thereupon the defendant, Illinois Central Railroad Company, presented to the Court, in writing, and prayed the Court to give and read to the jury Instructions A and D in words and figures as follows:

"A. If the jury finds from the evidence that the place where Haney was fatally injured was not on any property of the Illinois Central Railroad Company, then plaintiff is not entitled to recover against the defendant, Illinois Central Railroad Company, and your verdict must be in favor of said defendant."

"D. The Court instructs the jury that the defendant Illinois Central Railroad Company owed no duty to the deceased Haney to furnish any light at the place where he was injured, and, therefore, the jury cannot find against said defendant on account of failure to furnish light at said place."

Which said instructions, marked A and D, respectively, the Court refused to give to the jury.

[fol. 171] To which action of the Court in so refusing to give said instructions and each of them to the jury, the defendant Illinois Central Railroad Company, by its counsel, then and there duly excepted and continues to except.

DEFENDANTS' INSTRUCTION REFUSED

Thereupon the defendants, and each of them, presented to the Court in writing and prayed the Court to give and read to the jury an instruction marked "Instruction No. C," in words and figures as follows:

"Instruction No. C

The Court instructs the jury that all of the testimony given by the witness John J. Draschman, both in his deposition and on the witness stand before you, to the effect that someone said, near the scene of the accident to Haney, that Haney had been hit by something sticking out of the side of the train, or that such person thought Haney had been so hit, or that Haney was supposed to have been so hit, is hereby withdrawn from your consideration, and you must not consider any such statement or statements in arriving at your verdict."

Which said instruction the Court refused to give.

To which action of the Court, in so refusing to give and read to the jury the said instruction, the defendants, and each of them, by their counsel, then and there duly excepted and still continue to except.

VERDICT

Thereafter, to-wit, on the 3rd day of March, A. D. 1944, the jury returned into Court its verdict in said cause, in words and figures as follows:

[fol. 172] IN THE CIRCUIT COURT, CITY OF ST. LOUIS, DIVISION No. 9

No. 45112-C

WALTER A. LAVENDER, Administrator de bonis non of the Estate of Lyman Elmer Haney, deceased, Plaintiff,

vs.

J. M. KURN and FRANK A. THOMPSON, Trustees of ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY, debtor, and Illinois Central Railroad Company, a corporation, Defendants

We, the jury in the above entitled cause, find the issues joined in favor of the plaintiff and against all of the de-

fendants, and we assess plaintiff's damages in the sum of 30,000.00 Dollars.

(Signed) Canice T. Rice, Foreman.

Which said verdict, together with the instructions, was by the Court ordered filed.

DEFENDANTS' MOTIONS FOR A NEW TRIAL

And thereafter, to-wit, on the 7th day of March, A. D. 1944, at the said February Term of the said Court, and within four days after the rendition of the said verdict as aforesaid, the defendant Illinois Central Railroad filed its Motion for a New Trial in words and figures as follows (omitting caption):

"Comes now Illinois Central Railroad Co., one of the defendants in the above entitled cause, appearing for itself alone, and respectfully moves the Court to set aside the [fol. 173] verdict of the jury rendered in the above entitled cause and to grant this defendant a new trial of said cause for the reasons following, to-wit:

1. The verdict is against the law.
2. The verdict is against the evidence.
3. The verdict is against the law and the evidence.
4. The verdict is against the wrong party, being against this defendant when it should have been against the plaintiff and in favor of this defendant.
5. The Court erred in overruling this defendant's demurrer to the evidence at the close of all the evidence offered by the plaintiff.
6. The Court erred in overruling this defendant's demurrer to the evidence offered at the close of all the evidence in the case.
7. The Court erred in refusing to give this defendant's requested instruction peremptorily directing the jury to return a verdict in favor of this defendant offered at the close of all the evidence in the case.
8. The Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the plaintiff.
9. The Court erred in admitting hearsay evidence offered by the plaintiff and admitted by the Court.

10. The Court erred in refusing to admit competent, relevant and material evidence offered by this defendant and excluded by the Court.

11. The Court erred in giving each and every instruction offered by the plaintiff and given by the Court.

12. The Court erred in giving each and every instruction offered by the plaintiff, modified by the Court and given in modified form.

[fol. 174] 13. The Court erred in giving each and every instruction given by the Court of its own motion.

14. The Court erred in refusing to give each and every instruction offered by this defendant and refused by the Court.

15. The Court erred in modifying each and every instruction offered by this defendant and given by the Court in modified form.

16. The Court erred in overruling this defendant's motions to strike out incompetent, irrelevant, immaterial and hearsay evidence which motions were offered by this defendant and overruled by the Court.

17. The Court erred in overruling this defendant's motions to discharge the jury and order a mistrial of this cause, which were made by this defendant and overruled by the Court.

18. The verdict of the jury is excessive.

19. The damages assessed by the jury in their verdict are so excessive that they show that the verdict was prompted by bias, prejudice, passion or mistake on the part of the jurors.

Wherefore, this defendant moves the Court to grant it a new trial of said cause.

(Signed) Watts & Gentry.

And thereafter, to-wit, on the 7th day of March, A. D. 1944, at the said February Term of the said court, and within four days after the rendition of said verdict as aforesaid, the defendants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, debtor, filed their Motion for a New Trial in words and figures as follows (omitting caption):

[fol. 175] "Come now defendants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, Debtor, separate and apart from their codefendant herein, and move the Court to set aside the verdict and judgment returned and rendered in the above-entitled cause on March 3, 1944, and grant these defendants a new trial herein for the following reasons:

1. Because the Court erred in admitting, over the objections and exceptions of these defendants at the time, incompetent, irrelevant, immaterial and prejudicial evidence on the part of plaintiff.

2. Because the Court erred in excluding, over the objections and exceptions of these defendants at the time, competent, relevant and material evidence offered by these defendants.

3. Because the Court erred in overruling the demurrer to the evidence interposed by these defendants at the close of the evidence on behalf of plaintiff.

4. Because the Court erred in refusing to give the peremptory instruction in the nature of a demurrer to the evidence requested by these defendants at the close of all the evidence in the case.

5. Because the Court erred in giving, at the instance and on behalf of plaintiff, instructions, and each of them, numbered 1, 2, 5 and 8 in the series of instructions given by the Court.

6. Because the Court erred in refusing to give instruction lettered "C" requested by these defendants.

7. Because the verdict is against the weight of the evidence.

8. Because the verdict is against the law.

[fol. 176] 9. Because the verdict is against the law under the evidence.

10. Because the verdict is grossly excessive.

11. Because the verdict of the jury is so grossly excessive as to indicate that said verdict is, and because said verdict is, the result of passion, bias, and prejudice on the

part of the jury against these defendants and of favor, sympathy and partiality for plaintiff.

(Signed) A. P. Stewart, C. H. Skinner, Jr., Attorneys for Defendants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, debtor, 1025 Frisco Building, Phone Chestnut 7800."

ORDER OVERRULING MOTIONS FOR NEW TRIAL

And thereafter, to-wit, on the 24th day of April, A. D. 1944, and at the April Term of said court, to which said term said cause had by the Court been continued, the Court now being fully advised in the premises overruled said Motions for a New Trial of the defendants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, debtor, and of the Illinois Central Railroad Company.

To which action of the Court in so overruling their said motions for a new trial the defendants, and each of them, by their counsel, then and there duly excepted, and still continue to except.

AFFIDAVITS FOR APPEAL

And thereafter, to-wit, on the 15th day of May, A. D. 1944, defendant Illinois Central Railroad filed its Affidavit for Appeal in said cause, in due and proper form.

[fol. 177] And thereafter, to-wit, on the 19th day of May, A. D. 1944, at said April Term of said court, the defendants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, debtor, filed their Affidavit for Appeal in said cause, in due and proper form.

And on the 15th day of May, A. D. 1944, by an order duly made and entered of record in said cause, the Court granted the defendant, Illinois Central Railroad Company, an appeal in said cause to the Supreme Court of the State of Missouri and allowed defendant, Illinois Central Railroad Company, ninety days to file its Bill of Exceptions.

And on the 19th day of May, A. D. 1944, by an order duly made and entered of record in said cause, the Court granted the defendants, J. M. Kurn and Frank A. Thompson, Trustees of the St. Louis-San Francisco Railway Com-

pany, debtor, an appeal in said cause to the Supreme Court of the State of Missouri.

BILL OF EXCEPTIONS FILED

And now, inasmuch as the foregoing matters and things, objections, rulings and exceptions, do not appear of record in said cause, and in order that the same may appear of record and be preserved on the appeal of said cause to the Supreme Court of the State of Missouri, the defendants, Illinois Central Railroad Company, and J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, debtor, now tender this their joint Bill [fol. 178] of Exceptions in said cause, and pray that the same may be signed, sealed, settled, allowed, filed, and made a part of the record herein.

All of which is hereby accordingly done, this 27th day of November, A. D., 1944.

Joseph J. Ward, Judge of the Circuit Court of the City of St. Louis, State of Missouri, presiding in Division No. 9 thereof, during the trial of this cause. F. E. Williams, Judge of the Circuit Court of the City of St. Louis, State of Missouri, presiding in Division No. 9.

Approved: Watts & Gentry, Attorneys for Illinois Central Railroad. M. G. Roberts, E. G. Nahler, A. P. Stewart, C. H. Skinker, Jr., Attorneys for J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, Debtor. N. Murry Edwards, Attorney for Plaintiff.

[fols. 179-184] The above and foregoing is respectfully submitted by all of the appellants as and for their joint abstract in lieu of full record in the above-entitled cause.

M. G. Roberts, E. G. Nahler, C. H. Skinker, Jr., Frisco Building, St. Louis, Missouri, Attorneys for Appellants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, Debtor. Watts & Gentry, Louderman Building, St. Louis, Missouri, Attorneys for Appellant Illinois Central Railroad Company.

John W. Freels, 135 E. Eleventh Place, Chicago, Illinois, Of Counsel for Appellant, Illinois Central Railroad Company.

[fol. 185] And thereafter and on the 13th day of April, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E.
Haney, Deceased, Respondent,

vs.

J. M. KURN, ET AL., Appellants

Comes now the respondent, by attorney, and files additional abstract of record, with service copy, in the above-entitled cause.

Which said additional abstract of record is in words and figures following, to-wit:

[fols. 186-189] IN THE SUPREME COURT OF MISSOURI, DIVISION NO. 1, MAY TERM, 1945

No. 39,172

WALTER A. LAVENDER, Administrator d. b. n. of the Estate of
L. E. Haney, Deceased, (Plaintiff) Respondent,

vs.

J. M. KURN et al., Trustees of St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company, (Defendants) Appellants

Appeal from the Circuit Court of the City of St. Louis, Mo.,
Division No. 9, Honorable Joseph J. Ward, Judge

Respondent's Additional Abstract of the Record—Filed
April 13, 1945

Comes now respondent in the above entitled cause and states that the Appellants' Joint Abstract of the Record is imperfect, incomplete, erroneous and incorrect. It narates the evidence and testimony, excludes, misquotes and omits a great part of the evidence on material issues in this appeal. Respondent is not satisfied with Appellants' Joint Abstract of the Record, and therefore tenders this, [fol. 190] his Additional Abstract of the Record, in this case. All of the evidence hereinafter set out was admitted at the trial. We set out and copy certain exhibits admitted in evidence at the trial in full and we quote from the Bill of Exceptions giving the pages on which the evidence or testimony appears in the Bill of Exceptions as hereinafter mentioned.

BILL OF EXCEPTIONS

Plaintiff's Exhibit 4, admitted in evidence (App. Joint Abs. pp. 14-19 and 102) is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT 4

41652

This Agreement, Made and entered into this Twenty-seventh day of March, A. D. 1934, by and between the Illinois Central Railroad Company, party of the first part,

hereinafter for convenience referred to as the Central Company, and J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, party of the second part, hereinafter for convenience referred to as the Trustees, Witnesseth:

Whereas, the Central Company is the owner of and in possession of a passenger terminal in the City of Memphis, Tennessee, commonly known as "Grand Central Station", which the Trustees desire to use jointly with the Central Company and its tenants;

Now, Therefore, it is mutually understood and agreed as follows:

1. The Central Company hereby grants to the Trustees the right to use jointly with the Central Company and such other tenants as the Central Company shall have admitted, or may hereafter admit, to the use thereof, its aforesaid [fol. 191] passenger terminal, consisting of tracks, platforms, that part of its station building devoted to the accommodation of passengers, sale of tickets and checking of baggage, together with concourse and stairways leading to station platforms, joint mail terminal and such other facilities and appurtenances now or hereafter provided by the Central Company for the joint use of its tenant companies in the conduct and handling of passenger, express and mail business, the lands, premises and buildings embraced within said passenger terminal being shown in tinted red on the print hereto attached, while the tracks of said passenger terminal are shown by solid red lines on said print; and for convenience all such tracks and facilities shall hereinafter be referred to as the "Passenger Terminal."

[Page 1]

Said Passenger Terminal shall be used by the Trustees only for the arrival, loading, unloading and departure of their passenger trains (which term shall be deemed to include any engine, train or car) of the Trustees. The trains, engines and cars of the Trustees shall remain within the Passenger Terminal only for a reasonable length of time to permit the loading, unloading and necessary switching of such trains, engines and cars of the Trustees.

The Trustees shall have the right to switch with their own engines, their passenger trains and cars upon the

tracks of said Passenger Terminal to the extent necessary to handle and conduct their business, and to switch their passenger trains and cars with their own engines to and from the tracks of said Passenger Terminal from and to the passenger storage and cleaning yard of the Trustees.

The Central Company agrees to furnish, without cost, space for the lockers of the Trustees' train and enginemen in the locker room provided by the Central Company in the station building for its own employes, also space wherein [fol. 192] the Trustees may store a small supply of ice for their passenger cars.

The Central Company agrees to switch through cars from the trains of one party hereto to the trains of the other party at said Passenger Terminal, but no extra or additional charge shall be made against the Trustees for such service.

2. The Central Company shall, at its own cost, maintain and keep in repair all buildings, structures, tracks and appurtenances constituting said Passenger Terminal; furnish the services of its employes for the selling of tickets for the Trustees, loading and unloading their passengers and handling their baggage, including milk and cream handled in cans as baggage; mail and express business; watering and icing their passenger cars; telegraph and telephone service required for the operation of their trains in and out of the Passenger Terminal and the transaction of their business at said Passenger Terminal, and shall operate said Passenger Terminal in such manner as to reasonably accommodate the business of the Trustees.

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The Trustees shall furnish, at their own cost, all tickets, baggage checks and printed forms required for handling and reporting of their business.

3. The Trustees accept the grant herein and agree to use said Passenger Terminal for all their passenger trains arriving at and departing from, and the handling of their passenger traffic at, Memphis, Tennessee, for and during the term of this agreement, and they accept said Passenger Terminal in the condition and state of repair in which same is now in and as the same shall be maintained from time to time hereafter by the Central Company; provided, that if

said Passenger Terminal, or any part thereof, shall become defective and the Central Company shall fail to repair such [fol. 193] defect, and such failure shall continue for a period of fifteen (15) days after notice from the Trustees that such defect exists and that repairs be made to remedy such defect, then at the expiration of said fifteen (15) day period the Trustees shall have the right to make the repairs necessary to remedy such defect, at the expense of the Central Company.

4. The Trustees agree to pay to the Central Company monthly within twenty (20) days after receipt of bill, the sum of One Dollar and Eighty-seven and one-half cents (\$1.87½) for each car in the passenger trains of the Trustees arriving at or departing from said Passenger Terminal.

Motor or other self-propelled car, with or without trailer, shall be deemed as a train, and said rate per car shall apply to motor or self-propelled cars and trailers, but said rate shall not apply to motor or self-propelled cars when passengers, baggage or mail are not carried on or in such cars and such cars are being used solely as motive power for trailers.

No charge shall be made for locomotives, business or official cars of Trustees arriving at or departing from said Passenger Terminal, or for cars moved from said Passenger Terminal to the storage and cleaning yards of the Trustees after being unloaded, or for cars moved to said Passenger Terminal from said storage and cleaning yards of the Trustees for loading.

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5. It is understood that the rate herein to be paid by the Trustees for the use of the Passenger Terminal does not include inspection or repair of the engines, trains or equipment of the Trustees, the switching of cars of the Trustees, excepting cars in through service, the cleaning of cars of the Trustees or the furnishing of supplies to cars or locomotives of the Trustees. Permission is hereby granted to the Trustees to arrange with their own employees for proper and necessary inspection and emergency repair of their locomotives and equipment while their engines and cars may be upon the tracks of the Passenger

Terminal, and for such purpose the employes of the Trustees shall be allowed to go upon the premises of said Passenger Terminal. No charge will be made against the Trustees for water taken from the Central Company's water supply in supplying water to the Trustees' cars.

In cases of emergency, and upon request of the Trustees, the Central Company will perform or render services for and furnish supplies to the Trustees at the following rates:

(a) For labor for inspection or light repairs, at actual cost plus ten percent (10%) for supervision and accounting.

(b) For materials and supplies furnished cars and locomotives, except fuel, sand and water, actual cost f. o. b. Passenger Terminal plus ten percent (10%) to cover handling and accounting.

(c) For each tank of water furnished Trustees' locomotives, One Dollar (\$1.00).

(d) For coal furnished locomotives, at charge per ton equal to sum of price f. o. b. Passenger Terminal, plus 25¢ per ton for handling and use of coaling facilities.

(e) For each locomotive supplied with sand, twenty-five cents (25¢).

(f) For each passenger car cleaned, except diners, private cars and Pullman cars, One Dollar (\$1.00). Diners, private cars and Pullman cars will be cleaned at rates agreed upon in advance of work.

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(g) For ice furnished—[to be charged on same basis as (b)].

[fol. 195] (h) For heating cars with steam, thirty cents (30¢) per car per day or fractional part thereof.

(i) For any switching service performed, Ten Dollars (\$10.00) per engine hour for the time engaged in such service.

6. The management of the Passenger Terminal shall be under the control and jurisdiction of the Central Company, and all employes of the Trustees while in or about said

Passenger Terminal shall abide by and conform to the rules and regulations of the Central Company now or hereafter in effect with respect to the conduct of the business and affairs at said Passenger Terminal and the movement and operation of trains into and out of said Terminal.

7. In case any of the locomotives, cars or trains of the Trustees shall be wrecked or derailed while upon any tracks of the Passenger Terminal, the same shall be rerailed or picked up and removed by the Central Company, and the cost thereof, including the cost of repairing or renewing the track and/or facilities damaged in such derailment or wreck, except as herein otherwise provided, shall be borne and paid by the Trustees. If a wrecker be required to clear such wreck or derailment, Trustee shall furnish such wrecker promptly. Should Trustees fail to do so, Central Company will provide a wrecker, and, except as herein otherwise provided, the cost and expense of such wrecker, whether furnished by Trustees or by Central Company for Trustees, shall be borne and paid by Trustees.

8. For the purpose of determining liability:

(a) The Central Company's employees in said Passenger Terminal while engaged in performing any service for the sole benefit of one of the parties hereto shall be deemed the sole employees of such party:

(b) The Central Company's employees while engaged in performing or rendering any services solely for the [fol. 196] Trustees pursuant to the provisions of the second paragraph of Section 5 hereof, shall be deemed the sole employees of the Trustees.

(c) Locomotives while used in rendering any switching service solely for the Trustees pursuant to the provisions of the second paragraph of Section 5 hereof, shall be deemed the separate equipment and sole property of the Trustees.

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(d) Any and all baggage, mail or express brought by the Trustees to or onto the Passenger Terminal at any time for delivery there to any consignee, shall be deemed in possession of the Trustees until safely unloaded in a suitable place within the Passenger Ter-

terminal, and thereafter until delivered to such consignee shall be deemed in the possession of the Central Company.

(e) Any and all baggage, mail or express delivered at the Passenger Terminal for transportation therefrom by the Trustees, shall be deemed in possession of the Central Company until delivery by the Central Company on the train of the Trustees on which the same is to depart from the Passenger Terminal.

(f) Each passenger or patron while at or on the Passenger Terminal for the purpose of leaving on a train of the Trustees, or transacting business with the Trustees solely, shall be deemed the exclusive passenger or patron of the Trustees; otherwise such person shall be deemed the exclusive passenger or patron of the Central Company.

(g) Passengers and their baggage arriving at or departing from the Passenger Terminal, while within the Passenger Terminal, shall be deemed to be in the care and custody of the Trustees in case such passengers and baggage arrive or are destined to depart, as the case may be, in the Trustees' train; otherwise such passengers and their baggage shall be deemed to be in the care and custody of the Central Company.

[fol. 197] (h) Any passenger traveling on through ticket and transferring at the Passenger Terminal from a train of any railway carrier (including the Trustee) to a train of another of such carriers, shall be deemed the passenger of the receiving party when he shall have alighted safely from a car in the train of the party conveying him to the Passenger Terminal, and any such passenger, when not the Trustees' passenger within the intention of this sub-paragraph (h) shall be deemed, for the purpose of this agreement, to be the passenger of the Central Company.

9. Each party shall assume and bear all liability for death of or injury to any person or persons whomsoever, or damage to any property whatsoever, including all loss, cost and expenses incurred by the other party, when due solely to the acts, omissions or negligence of any of its sole employees, or the defective condition of its engines, cars or trains.

Each party shall assume equal liability for death of or injury to any person whomsoever, any damage to any property whatsoever, or any loss, cost or expense, when due to the concurrent acts, omissions or negligence of the sole employes of both parties hereto, except that each party shall assume and bear all liability for death of or injury to its sole employes, persons and patrons in its care, and

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damage to its property, and property in its custody, and any loss, cost and expense relating or applying to its own business.

Each party shall assume all liability for death of or injury to its sole employes, passengers and patrons in its care, damage to its property and property in its custody, and any loss, cost and expense with respect to its own business, due to the acts, omissions or negligence of third persons, the condition or state of repair of said Passenger [fol. 198] Terminal, or any part thereof, unknown or concealed causes making it impossible to determine the responsibility, an Act of God, or fire the origin of which shall be unaccounted for; provided, that in case of the derailment of the engines, cars or trains of either party hereto, due to any of the causes in this paragraph mentioned, the party whose engine, train or car or cars was or were thus derailed, shall also assume liability for death of or injury to persons and damage to property not in its employ, care or custody, growing out of or attributable to such derailment.

The Central Company shall be bound to use only reasonable and ordinary care, skill and diligence in the maintenance, repair and renewal of the tracks and facilities constituting said Passenger Terminal, and the Trustees shall, and hereby agree to, indemnify and save harmless the Central Company from any liability, loss, damage or injury incurred or sustained by the Trustees by reason of any defect in any such tracks or facilities, or any part thereof, or the condition or state of repair in which the same may be maintained at any time, or from time to time, anything herein to the contrary notwithstanding.

Neither party shall have any claim or right of action against the other party for any liability, loss or damage incurred or sustained by it by reason of any delay suffered

by any of its engines, trains or cars, or its traffic, while upon or within the Passenger Terminal, however caused, and whether or not due to the negligence of the other party, its agents or employes.

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Receipts from business of Trustees handled at said Passenger Terminal shall be accounted for as directed by them, and neither party hereto shall be liable to the other party for loss or embezzlement of its funds through the acts, [fol. 199] omissions or negligence of any employes of the Central Company at said Passenger Terminal. In case of embezzlement, theft or loss of any such money by any such employes, the amount of cash on hand at the time of embezzlement, theft or loss, when investigation is made to determine the amount, shall be apportioned between the parties hereto on the basis of the amount due each, such amount to be determined by the parties' joint audit of the accounts of such employes. The Trustees may, at their own expense, bond such employes for such sum or sums as the Trustees deem necessary to protect their own interest.

Each party covenants and agrees with the other party that it will pay for all loss, damage and expense, both as to persons and property, liability for which it has herein assumed, the judgment of any court to the contrary notwithstanding; and will forever indemnify and save harmless the other party, its successors and assigns, from and against all liability and claim therefor, or by reason thereof, and will pay, satisfy and discharge all judgments that may be rendered by reason thereof, and all costs, charges and expenses incident thereto.

In case of death of or injury to persons, damage to property, for which the parties hereto are jointly responsible under the liability section of this agreement, the Central Company may make settlement in such case by voluntary payment of money or other valuable consideration. In any such settlement, release from liability shall be taken in the names of both parties hereto. The Central Company, however, shall not make any such compromise or settlement in excess of the sum of Five Hundred Dollars (\$500.00) without the written authority of the Trustees, but any settlement made by the Central Company in consideration of said sum or a lesser sum shall be binding upon the Trustees.

[fol. 200] Neither party shall, however, be concluded by any judgment or decree at law or in equity against the other party hereto unless it has had reasonable notice from such other party requiring it to appear in the action or suit and make defense thereto for its own account or jointly with the other party. If such notice shall have been given by one party hereto to the other party and the party receiving such notice shall have failed to appear and make defense it shall be concluded by the judgment or decree in such suit.

10. The Trustees shall indemnify and save harmless the Central Company from any liability incurred by it, or any fine or penalty imposed upon it, for or by reason of any failure on the part of the Trustees to comply with any law, ordinance or regulation of competent public authority governing or pertaining to the condition or state of repair of their engines, cars and trains, safety appliances thereon, or the manner of operating their trains or the handling of passengers and traffic thereon.

11. If default shall be made by the Trustees in any of the payments herein agreed to be made by them and such default shall continue for sixty (60) days after the amount payable became due, or if the Trustees shall fail to keep and perform any covenant and stipulation on their part to be performed, and such default shall continue for sixty (60) days after demand in writing shall have been made by the Central Company that such covenant or stipulation be performed, then and in such case, and although no action may have been taken on account of any previous default or defaults, the right of the Trustees to the use and enjoyment of the rights and privileges herein granted to them shall, at the election of the Central Company, but not otherwise, at once cease and determine, and the Trustees shall upon such election having been made and written notice [fol. 201] thereof to them given, be excluded from the use and enjoyment of the rights and privileges herein granted.

12. This agreement shall take effect as of January 1, 1932, and subject to the provisions of Section 11 and subject to termination as hereinafter in the next succeeding paragraph hereof provided, shall continue in force until

terminated by either of the parties hereto giving to the other party six (6) months' written notice of intention to so terminate this contract.

Unless sooner terminated as hereinbefore provided, this agreement shall ipso facto terminate as to the Trustees, their successor trustee or trustees, upon the date that possession of the railroad and property of said St. Louis-San Francisco Railway Company, Debtor, by the Trustees, or their successor trustee or trustees, shall cease. If this agreement be in force when such possession by Trustees, or their successor trustee or trustees, shall cease, it shall thereupon become, and, subject to the terms and provisions hereof, thereafter continue in force as an agreement between said Central Company, its successors or assigns, as first party, and St. Louis-San Francisco Railway Company, its successors or assigns, as second party, provided said St. Louis-San Francisco Railway Company, its successors or assigns, shall by written notice to Central Company, its successors or assigns, elect to adopt same.

13. It is understood and acknowledged that the effectiveness of this contract is dependent upon the Trustees securing the approval thereof by the Interstate Commerce Commission, and that until such approval is secured, this contract shall not be binding on the parties hereto. The Trustees agree that they will, without unnecessary delay and due diligence, proceed to secure such approval.

[fol. 202] In Witness Whereof, the parties hereto have executed this agreement in duplicate, the day and year first above written.

Illinois Central Railroad Company, by William Atwill, Vice President & General Manager. J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, by H. L. Worman, Chief Operating Officer.

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May 23, 1934.

DEAR MR. WORMAN:

I have your letter of May 16th, file 890-8, enclosing contract under which your Company will continue the use of our station facilities at Memphis. The changes made on pages 2, 4 and 5 of the contract, by reason of eliminating

the charge in sub-paragraph (g) of Section 5 for labor to water and ice your cars, are satisfactory, except with the following understanding, and it is with such understanding that I have executed the contract on behalf of the Illinois Central:

That the obligation on the part of the Illinois Central to furnish the services of its employes to water and ice your passenger cars as stipulated in the first paragraph of Article 2, on page 2 of the contract, applies only to passenger cars in the trains of your Company operating through Memphis, and that it is not the intention that this Company will furnish labor for watering and icing passenger cars in trains of your Company originating or terminating at Memphis, but that all such cars, except possibly [fol. 203] in cases of emergency, will be iced and watered in your coach yard before their arrival at the station.

And with the further understanding that above mentioned obligation shall not be construed as requiring this Company to furnish labor or ice for icing cars or machines for air conditioning purposes, if and when your Company should undertake to air condition its cars at Memphis.

I shall be pleased to have you acknowledge your acquiescence to the foregoing understanding, so that I may file a copy of this letter and your reply with our copy of the contract.

As to your request for ten copies of the contract, I will submit these just as soon as we can have them prepared.

Yours very truly, (Sgd.) W. Atwill, Vice Prest. & Gen. Mgr.

cc—Mr. Bunting, Mr. Quigley, Mr. Holcomb.

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St. Louis-San Francisco Railway Company

J. M. Kurn and John G. Lonsdale, Trustees

St. Louis, May 28, 1934.

890-8

Mr. W. Atwill, VP&GM, Illinois Central System, Chicago, Ill.

DEAR MR. ATWILL:

This will acknowledge receipt of executed counterpart of agreement between the Illinois Central and Frisco Trustees

dated March 27, 1934, covering our use of your passenger [fol. 204] station facilities at Memphis, received with your letter 23rd, file 67-182, in which you set forth the understanding in respect to services to be rendered in watering and icing our through passenger cars, which is satisfactory.

Application will be filed by us promptly with the Interstate Commerce Commission for its approval.

Yours very truly, H. L. Worman, Chief Operating Officer.

E. L. GATES, being duly sworn, deposes and says in behalf of the plaintiff as follows:

Direct examination.

By Mr. Edwards:

(Witness E. L. Gates testified, Bill of Ex. pp. 25 to 28:)

Q. Do you know anything more about this injury than you have told me—I mean the injury to Mr. Haney?

A. No, nothing more than he was wearing a white cap and it was new or practically new, it had not become soiled, and I looked at the cap, and at a point about where my finger is there (indicating).

Q. You are pointing to the back of your head?

A. Yes. (Continuing) Was a black dirty spot on the cap, on the outside.

Q. No blood on the inside?

A. No, sir, no blood stains, but just a black spot. And I was told later that that corresponded with the location of the injury on his head.

Q. On the back of his head?

A. Yes, sir.

Q. This cap you speak of was a white cap, was it?

A. Yes, sir.

Q. And this black spot that you have described on this [fol. 205] cap was on the outside and on the back of the cap?

A. Yes.

Q. Did you indicate a little to your right?

A. A little to the right of the center of the head.

Q. A little to the right of the center of the head?

A. A little lower than the crown.

Q. And a little lower than the crown of the head?

A. Yes.

Q. About the top of the ear?

A. Well, possibly just a little above the top of the ear.

Q. Possibly a little above the top of the ear?

A. Yes, sir.

Q. Could you describe a little better this cap, this black spot on the cap, how large it was?

A. It was about the width of my finger and possibly an inch and a half long.

Q. About the width of your finger, and your finger is about a half inch thick, isn't it?

A. Possibly so.

Q. And about two inches long?

A. An inch and a half, something like that.

Q. About an inch and half long?

A. Yes.

Q. And did that run horizontal across the cap?

A. I don't recall now just the exact manner, but it seemed like there was bars across down this way, that it struck not across, but kind of at an angle, downward like.

Q. Did anyone else look at that cap besides yourself?

A. I showed it to someone there, but I don't recall who it was.

Q. Did you see any pistol or any weapon around there?

A. No, sir.

Q. Did you see Mr. Haney's lantern around there?

A. Well, I don't know, there were several men there with lanterns and I don't know that it was his lantern. If I saw it I didn't recognize it as being his.

Q. And did you see any spot of blood around there?

A. No, sir.

Q. And did you see any instrument, any pipes or any clubs or anything lying around there?

A. No, sir.

[fol. 206] Q. Were there any lights around there that shone on this place?

A. You mean street lights or something like that?

Q. Yes, electric lights of some kind?

A. No, there was no lights there and none near there.

Q. Has there been any light erected there since?

A. Yes, there has been lights put up since then.

Q. And where?

A. Right near this spot where he was killed.

Q. That light wasn't there at the time he was killed?

A. No.

Q. This light that has been erected since, does that shine on or near this switch, the Frisco switch?

A. Yes, it is near the switch.

Cross-examination.

By Mr. Skinker:

(Witness E. L. Gates testified again, Bill of Ex. p. 34:)

Q. The overhang of an ordinary passenger train is, roughly, two to two and a half feet, isn't it, somewhere in that neighborhood, the overhang of the train?

A. Yes, sir.

Mr. Edwards: You mean to the side of the rail?

Mr. Skinker: Yes.

By Mr. Skinker:

Q. It extends beyond the rail?

A. Yes, it would be about, I guess, twenty-four to thirty inches.

Q. Twenty-four to thirty inches?

A. Yes.

Q. That the engine and cars extend north of the north rail?

A. Yes.

(Witness E. L. Gates testified again, Bill of Ex. pp. 36 and 37:)

By Mr. Skinker:

Q. Now I understood you to say in answer to a question from Mr. Edwards that you observed a black or dark spot [fol. 207] on the back, sort of the right-hand side of the white cap which Mr. Haney was wearing at the time? That is correct, isn't it?

A. Yes.

Q. Just describe that spot there, about how long, how wide, and so on, did it appear?

A. Well, as well as I can recall, possibly half an inch wide or maybe a little wider, and about an inch and a half long, as well as I can recall.

Q. Was it sort of in the rounded part of the cap, in the rear, where the cap fits the contour of the back of the head?

A. Well, it looked like it might have been at a place just off of the center of the head, if you draw a line down.

Q. A little to the right?

A. To the right and a little below the center of the head, but I would say above the ear.

Q. Would you say it was sort of a mark there that looked like it had been made by some blunt object such as a pipe or club or something of that sort striking against there? Did it have that appearance to you?

A. Well, it—it's where I think something struck it; just what and where and how I couldn't say, just what it was; but it was something come in contact there, in my opinion.

Q. And it left those dark marks on the cap that you describe?

A. Yes, sir.

Mr. Edwards: On the outside of his cap?

Mr. Skinker: On the outside.

The Witness: On the outside.

Mr. Edwards: And in the back?

The Witness: In the back.

Redirect examination of Witness Gates.

By Mr. Edwards:

(Bill of Ex. pp. 48-51)

Q. Just a question or two, Mr. Gates. After this train on this occasion, on the 21st day of December, 1939, passed you, backing into the station, the train backing east and then turning north—wasn't it?

A. Yes.

[fol. 208] Q. Now after it passed you on that occasion, this train, just before you found Mr. Haney, did you stand and watch the train for some distance, back?

A. It would not have been my custom to have done that, and I don't recall on this specific date whether I did or whether I did not; but it would not have been my custom to watch it beyond the clearing of my switch.

Q. And that would be how far east of where you were standing, would you watch it customarily?

A. Well, just as soon as he would clear my switch, just as soon as he would get by, to where I could reline my switch to its normal position.

Q. When you say reline the switch after the train, I take it, the engine, had backed east of you?

A. Yes. After the engine had backed off of the switch.

Q. What did you have to do to reline that switch after the engine had backed on east of where you were?

A. Just go to the switch stand and throw the switch lever over.

Q. And when you throw it over, what do you do, throw it which way? You turn it, don't you?

A. Yes.

Q. A lever or handle there?

A. Yes.

Q. That lever is about two or three feet long, is it?

A. Two feet long, I would say.

Q. And has some weight on the end of it, does it?

A. Yes, there is a heavy ball on the end of it.

Q. A heavy ball of metal, isn't it?

A. Yes.

Q. And you turn that which way to open it to let the train back in?

A. Well, it just depends on the set-up of the switch; this particular switch I couldn't tell you whether I would throw it to the right or to the left, off-handed I couldn't—

Q. Did you get—well, go ahead.

A. I say, I couldn't recall whether the switch was moved to the right or the left.

[fol. 209] Q. You don't recall whether you threw it to the north or to the south?

A. That is right.

Q. It does turn, that switch lever that you have described, to the north and down to the ground, and then turns back to the south and down to the ground?

A. No, it works the opposite, it works parallel with the tracks.

Q. Oh, does it?

A. Yes.

Q. It works parallel with the tracks?

A. Yes.

Q. It turns over to the west or to the east?

A. That is right.

Q. Now, you don't recall which way it turns to open the switch when the train comes in?

A. No, they will have a switch in there, maybe you will turn it eastward for your main line movement, and maybe the next switch you would turn, it would turn just the opposite.

Q. On this occasion with this train that backed in, just before they found Mr. Haney, you threw this switch that you are talking about, your switch, one way or the other as the train pulled west, didn't you?

A. Yes, I threw it one way or the other to make it line up, but just which way I moved that lever, I don't recall, I don't recall how it looked up.

Q. I understand. Was it necessary for you to throw that switch that you have described before that train, that engine, passed you going west, on that occasion?

A. Yes.

Q. It was necessary?

A. Yes.

Q. And after that train had backed east and north into that station, your next duty was to line or close that switch, wasn't it?

A. That is right.

Q. And you did that on this occasion?

A. Yes, sir.

Q. Now, when you closed that switch, after the engine had backed east of you, did you look on east to where the train was backing to?

A. No, not after it had cleared my switch. I had completed my duty in the handling of that particular train."

[fol. 210] (Deposition pp. 54-55, Witness Gates testified, further:)

Q. When you walked east, when you received a message that Mr. Haney had been injured, what distance could you see, as you walked on that occasion?

A. Well, it was dark; there is a street light right there where I work, right on that corner, and there is no more street lights between there and Haney's office. At Florida street there is a subway and what street light they have is underneath the subway. At Main street there is a subway—that is the next corner.

Q. As you walked east on that occasion, after you had received a message Mr. Haney had been injured, how

close did you come to these parties at this switch where Mr. Haney was found, before you saw them?

A. How close to the parties standing around there?

Q. Standing around there, how close were you to them when you first saw them?

A. Oh, I don't know. I walked on down to where they were.

Q. Did you see them, do you think, when you were within fifty feet of them?

A. Now, I wouldn't think so, because it was after night.

WALTER ORA BUNDY, being duly sworn, deposes and says in behalf of the plaintiff as follows:

Direct examination.

By Mr. Edwards:

(Bill of Ex. pp. 64-65, Witness Bundy testified:)

Q. Where was his cap, did you notice?

A. Laying out a little to the right of his head, if I remember right.

Q. A little to the right of his head, which would be between his head and the tracks?

A. Yes, sir.

Q. Yes. And what kind of a cap was it?

A. A white cap.

[fol. 211] Q. Did you notice anything about the cap, any marks on it of any kind?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did you examine it?

A. No, sir.

Q. Carefully.

A. No, sir.

Q. You didn't?

A. No, sir.

Q. There might have been marks on it that you didn't see?

A. I didn't see, and in fact, I didn't notice it.

Q. You didn't notice it. Now, did you look around there on the ground to see if there had been any struggle?

A. No, sir.

Q. Did you see any evidence of any struggle around where Mr. Haney's body was lying?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Did you see any club or pipe?

A. No, sir.

Q. (Continuing) Or weapon of any kind?

A. No, sir.

Q. Did you see any pistol laying around there?

A. Under his body.

Q. Under Mr. Haney's body?

A. Yes, sir.

Q. Now, if I understand you, he was lying face down?

A. Yes, sir.

(Witness Bundy testified at pp. 66 to 70 in Bill of Ex.):

Q. Before you turned him over did you see anything on Mr. Haney's back, or his head, that indicated he had been struck and injured?

A. Yes, sir.

Q. On the back of the head?

A. Yes, sir.

Q. Where did you see that?

A. Right on the back of his head, right up there (indicating).

Q. Right on the back of his head?

A. Yes, sir.

Q. And you indicated the right back of his head?

A. Yes, sir, right back in there (indicating).

Q. What did you see back there?

A. A gash about two inches long, I would say it was two inches long.

Q. Was that bleeding?

A. Yes, sir.

[fol. 212] Q. And did you see any other injury on him besides this injury you have described?

A. No, sir.

Q. You did not?

A. No, sir.

Q. You say you turned him over?

A. Yes, sir.

Q. Who was present when you turned him over?

A. Mr. Claude Bruso.

Q. Claude Bruso and yourself?

A. Yes, sir.

Q. Now, before you turned him over did you see his lantern or a pistol there?

A. No, sir.

Q. After you turned Mr. Haney over did you see a pistol or a lantern?

A. Yes, sir.

Q. And where was the pistol or lantern?

A. Under his body.

Q. Under his body?

A. Yes, sir.

Q. Was the pistol in his hand?

A. No, sir.

Q. Or just lying under his body?

A. Just laying there.

Q. Laying under his body?

A. When we turned him over the pistol come in view.

Q. Did it appear that the pistol had fallen out of his pocket or out of his hand, or just did it appear and—

A. It just appeared there.

Q. And indicated it might have—

A. It indicated it might have slipped out of his pocket.

Q. You would say it slipped out of his pocket?

A. Might have, I say.

Q. Probably did?

A. Yes.

Q. And his lantern, was that in his hand, did you notice?

A. No, I don't know, I don't know whether it was in his hand or not; it was laying on the ground, that is all I know.

Q. Mr. Haney's clothing, were they disrupted in any way, to indicate a struggle?

A. No, sir.

Q. They were not?

A. No, sir.

[fol. 213] Q. His head was pointing, as you say, south-east?

A. Yes, sir.

Q. And this train, Frisco train, had just backed east and turned north?

A. Yes, sir.

Q. Into the station?

A. Yes, sir.

Q. Now, did you notice that switch there close to where Mr. Haney's body was found?

A. Yes, sir.

Q. Was that open or closed when you and Mr. Bruso arrived there?

A. It was open.

Q. It was open?

A. Yes, sir.

Q. And by that, it wasn't lined?

A. No.

Q. Now, I believe, the next duty of Mr. Haney was to close that?

A. Yes, sir.

Q. I believe you know that, I suppose, do you?

A. Yes, sir.

Q. You know, as a switch tender?

A. Yes, sir.

Q. And you know about what he does there, don't you?

A. Yes.

Q. So that, this switch there, close to Mr. Haney's body, this Frisco switch, was not closed and relined when you got there?

A. No, sir.

Q. Now, they say there is a red light of some kind shows until that is closed, is that true?

A. It shows red when it is throwed to back the train around the wye, and green when it is lined, as we call it, for the main line.

Q. That is what I mean. If Mr. Haney had relined that switch and closed it, would it then have automatically showed green? Is that right?

A. Yes, sir; yes, sir.

Q. Where is that light? Tell me.

A. It is right in what we call a lamp.

Q. Is it in that switch there?

A. It is in a lamp that sets on the switch stand, it is a casting of metal, and there is a bulb in that cup in there with oil.

Q. You indicate it is about three inches in diameter or more?

A. More.

Q. About three inches in diameter?

A. Yes, sir.

[fol. 214] Q. And that is right on that Frisco switch there close to Mr. Haney's body?

A. Yes, sir.

Q. And as you approached you noticed that red?

A. Yes, sir.

Q. And if he would have thrown that switch it would have automatically turned green?

A. Yes, sir.

Q. In other words, when you throw that switch you don't have to turn the light to make it green?

A. No, sir.

(Witness Bundy testified further at p. 73 in Bill of Ex.:)

Q. And how long would you say, Mr. Bundy, that you and Mr. Bruso remained there where you found Mr. Haney, where you turned him over on that occasion?

A. Well, the two of us didn't remain there very long, I wouldn't say—not over five minutes, if I remember right.

Q. You and Mr. Bruso?

A. Yes.

Q. And what did you do after that time?

A. He went and called the ambulance, I believe.

Q. Mr. Bruso did?

A. Yes.

(Witness Bundy also testified at p. 74 in Bill of Ex.:)

Q. And outside of this lick in the back of the head that you described, when you held him up in your arms, did you notice anything else about him?

A. No, sir.

Q. About his face, was his face skinned up?

A. It was bruised from hitting the ground.

Q. That is what I am getting at.

A. Yes, sir.

Q. His face appeared to be bruised from hitting the ground face down?

A. Yes, sir.

Q. And can you give me a little better description of the condition of the face, what part of his face was—you indicated the cheek there?

A. I believe it would be the left side.

Q. The left side?

A. Yes.

[fol. 215] Q. And on his cheek bone of his face, do you think?

A. Down along this way (indicating).

Q. Were there cinders in his face?

A. Yes, sir.

(Witness Bundy testified at p. 75, in Bill of Ex.:)

Q. How soon did the ambulance come to take Mr. Haney's body away?

A. I don't know how long it was. I thought it was a long while myself, because the position I was sitting in I was getting very much cramped there, and I didn't want to lay his head down on the ground until they come there. I don't suppose, though, it was over ten or twelve minutes.

Q. You held his head for some time, then, did you—several minutes?

A. I held his head until the ambulance arrived there.

Q. Oh, you did?

A. Yes, sir.

(Witness Bundy testified at p. 76, also in Bill of Ex.:)

Q. When you turned him did you just turn him over or carry him some distance?

A. We turned him over to the left.

Q. Turned him over to the north?

A. And turned him around.

Q. To the north and east?

A. Yes, sir.

Q. And you say you turned him around?

A. Yes, sir.

Q. And how did you turn him, which direction did you turn his head?

A. North.

Q. Turned his head more to the north?

A. Yes, sir.

Q. Did you turn him so that his head was pointing more north than east?

A. I believe it was; yes, sir.

Q. And you did that, I guess, when you first turned him over?

A. Yes.

Q. You and Mr. Bruso?

A. Yes, sir.

[fol. 216] Cross-examination of Witness Bundy.

By Mr. Skinker:

(Bill of Ex. p. 82.)

Q. How far was his head north of the north rail of the track?

A. I would say about five feet, five foot and a half.

Q. And then his feet were something like five feet or so on north of that?

A. Yes, sir.

Q. From his appearance did he appear to have fallen forward or backward?

A. Forward.

EDWIN ARNOLD.

Direct examination.

By Mr. Edwards.

(Bill of Ex. p. 84.)

Q. Will you give us your name in full?

A. Sam Edwin Arnold.

Q. And where do you live, Mr. Arnold?

A. 1075 University street, Memphis.

Q. Memphis, Tennessee?

A. Memphis, Tennessee.

Q. How old are you, Mr. Arnold?

A. Thirty.

Q. What is your business?

A. Switch tender.

Q. Switch tender for who?

A. Illinois Central Railroad.

Q. Often referred to as the I. C. Railroad?

A. Yes, sir.

Q. How long have you been a switch tender for the Illinois Central Railroad?

A. Four and a half years.

Q. Were you working as such switch tender in December, 1939?

A. Yes, sir.

Q. What were your hours of work at that time?

A. 2:30 p. m. to 10:30 p. m.

Q. Where were you stationed?

A. Grand Central Station.

Q. And did you have any particular place you were working on December 21, 1939?

A. I was working at the south end of the station, at Carolina street.

[fol. 217] Q. Is that close to where Lyman Haney was working?

A. Yes, sir.

Q. Were you working out of the same shanty that he worked out of?

A. No, sir.

Q. Which direction was your shanty located from Haney's shanty?

A. North.

Q. North. And you were at Carolina street, weren't you, that is, one block north, is it?

A. Yes, sir.

Q. What were your duties in December, 1939, as switch tender, Mr. Arnold?

A. Well, I was putting trains in and out of Grand Central Station, handling switches.

Q. Just give me an idea what your duties would be, what you did all night.

A. Well, I handle the switches to let the trains in and out of Grand Central Station, that is about all I can give you.

(Witness Arnold testified in Bill of Ex. at p. 90:)

Q. You couldn't tell me. Did you see evidence where Haney had bled, on the ground there close to the switch some place?

A. I did.

Q. You did. And where was that?

A. It was about eight or ten feet from the switch.

Q. Was that close to where Bundy was holding his head?

A. It was.

Q. And by close to it, you mean within a foot of where he was holding him?

A. I would say it was a foot or two away, yes, sir.

Q. You would say the blood was within a foot or two of where Bundy was holding Haney's head at that time?

A. That is it; yes, sir.

Q. Would you say the blood was between Mr. Haney's head and the Frisco tracks?

A. Yes, sir.

Q. It was?

A. Yes, sir.

[fol. 218]—(Witness Arnold testified in Bill of Ex. at pp. 92 to 95:)

Q. You knew of Haney's duties, to throw this switch and open it so that the Frisco train could back in, didn't you?

A. Yes, sir.

Q. What would be Mr. Haney's next duty after that Frisco train had backed in?

A. Close the switch.

Q. Close the switch?

A. Yes, sir.

Q. That was to close it immediately, would it be?

A. Yes, sir.

Q. Have you thrown similar switches to this, where you saw Mr. Haney's body there—on the Frisco?

A. Yes, sir.

Q. And you have done that continuously for three or four years, haven't you?

A. Yes, sir.

Q. When you throw these switches, you raise a lever and throw it over, don't you, from one side to the other?

A. Yes, sir.

Q. Now, when you throw a lever like that to open it, to let a train back in, such as the Frisco, in a place similar to where Haney was found, what is your next duty? What do you do then?

A. I just throw it over and latch it.

Q. Latch it, fasten it?

A. There is a latch on it; yes, sir.

Q. Then what do you do—or what did you do then?

A. Well, we give a signal for the train to back in.

Q. You give a signal for the train to back in?

A. Give a signal to the train, to the conductor or—

Q. Who do you give that signal to?

A. Well, it is according to whether the train is backing up or coming forward. Backing up it would be the conductor.

Q. It would be the conductor. And what kind of a signal would that be? Can you describe it a little better with your words, for me?

A. Well, just a round signal with your lamp.

Q. Round signal with your lantern?

A. That is right.

Q. And would you ever give such a signal as that to [fol. 219] the engineer?

A. No, sir—yes, you would if he would be backing up, you would.

Q. If he would be backing up you would give it to the engineer?

A. Yes, sir.

Q. And then after giving such a signal to back up—that is a signal to back up you are talking about?

A. Yes, sir.

Q. You would give such a signal after you have thrown the switch and opened it?

A. Yes, sir.

Q. Then what would you next do?

A. Well, you would just stand there and wait until the train got back.

Q. Backed up, you mean?

A. Yes, sir.

Q. And when the train backed up then next what would you do?

A. Close the switch.

Q. Close the switch. Would you wait for some time after it backed in, or close it just as soon as it had cleared?

A. Close it as soon as it cleared.

Q. Just as soon as the engine backed in you would close the switch?

A. Yes, sir.

Q. Then you would go to your next duty?

A. Yes, sir.

Q. You have done that for the three or four years?

A. Yes, sir.

DENMAN M. STUBBS, testified on behalf of plaintiff as follows:

Direct examination.

By Mr. Edwards:

(Bill of Ex. at pp. 107 to 108)

Q. Do you remember seeing him on this occasion, on December 21, 1939, Lyman Haney?

A. Well, it was dark and I couldn't tell who it was; all I could see, as I figured, was the switch tender's light, as he come over from the shanty toward the read end of our train.

Q. That was there at the cross-over?

A. Yes, sir; just below the cross-over.

[fol. 220] Q. Just below—and when you say just below the cross-over, you mean——

A. Just west.

Q. Just west of the cross-over?

A. Yes, sir.

(Witness STUBBS testified further in Bill of Ex. at pp. 110 to 111:)

Q. And you told me about seeing Mr. Haney come out on that occasion as your train went west over that crossing?

A. I didn't say it was Mr. Haney.

Q. You saw a man come out?

A. That is right.

Q. And you didn't know it was Haney?

A. I couldn't tell. I saw a lantern.

Q. You thought it was the switch tender?

A. I couldn't say who it was; I took for granted it was the switch tender; it was dark and I took for granted——

Q. Because he did that—you saw him do that before?

A. Yes, he come out——

Q. What did he do, this man you saw with the lantern?

A. The last I saw him it looked like he was going to get on the rear end of our train and ride down to the switch, which was west of his shanty.

Q. About two hundred and fifty feet west of his shanty, wasn't it, the switch?

A. Something like that, yes.

(Witness STUBBS also testified in Cross-examination, by Mr. Skinker, Bill of Ex. at pp. 122 to 124:)

Q. Now, at the time you stopped that train how many car lengths north or northeast of this wye switch stand was the rear end of the train?

Mr. Edwards: He said about one hundred feet.

A. The rear end?

By Mr. Skinker:

Q. Yes.

A. From the switch stand—you mean where it was lined up for us to back in?

Q. Yes, the wye switch they call it.

A. I judge it was a train and a half length.

[fol. 221] Q. You mean by that something like fifteen hundred feet?

A. Something like that; yes, sir.

Q. At the time he stopped?

A. From where he stopped.

Q. In other words, the engine had already backed beyond the switch stand?

A. Should have been beyond the switch and should have cleared that switch.

Q. And no part of the train would have been left on the main line, in your judgment?

A. In my judgment he should have had room enough to clear that switch at that time.

Mr. Skinker: That is all.

Redirect examination of Witness Stubbs.

By Mr. Edwards:

Q. Just a question or two. When you told me that the back end of that train stopped about one hundred feet north of the Frisco tracks, was that by signal from you?

A. Yes, sir.

Q. Then you said it stood there with the back end of the train about one hundred feet north of the Frisco tracks?

A. That is right.

Q. Yes. Now, the front end of the train was on west of there, wasn't it?

A. Yes, sir.

Q. I believe the train was about eleven hundred feet long, approximately?

A. Something like that.

Q. From the front of the engine?

A. A thousand feet we would say, anyway.

Q. That is twelve coaches and the engine and tender?

A. Yes.

Q. Then when you gave it a signal to go on, after the train, the rear end of it had stopped about one hundred feet north of the Frisco tracks, you gave it a signal to go on and continue to back up; did it start up immediately from your signal?

A. I think he had to take the slack out of the train to get it started, if I remember correctly, on account of the [fol. 222] heavy grade backing in there; they had already started up part of the grade, the rear end getting back.

Q. That is what I am trying to get at.

A. Yes, sir; he came back.

Q. From the time you gave him a signal, when the rear end of the Frisco train was about one hundred feet north of these Frisco tracks, did it continue to go on in until it went into the station on that occasion?

A. As I remember, we didn't make another stop, we went right on into the station.

The appellants in printing the testimony of witness John Joseph Drashman have reduced the same to the narrative form and in many places the significance, meaning and effect of Drashman's testimony has been changed so that the respondent believes the only way to properly, fully and fairly submit the testimony of witness, John Joseph Drashman given at the trial and the testimony of John Joseph Drashman given in his deposition before the trial filed in the case and offered in evidence at the trial is to print the testimony of Drashman in full given at the trial and to print in full the testimony of Drashman given in the deposition and offered in evidence at the trial.

We, therefore, set out what occurred and took place at the trial before Drashman was placed on the witness stand and at the time respondent offered to read Drashman's deposition in evidence taken from the Bill of Exceptions, pages 126 to 204, inclusive, which is as follows (Bill of Ex. p. 126):

By Mr. Hart: Now, I will read from page 189, John Joseph Drashman. He is offered only against the Frisco, the same as the other depositions.

By the Court: Very well.

[fol. 223] By Mr. Skinker: Mr. Drashman is present in Court, and his deposition is not admissible in direct evidence. Is Mr. Drashman back there?

By Mr. Drashman: Yes, sir.

By Mr. Skinker: And I think there is no question under the statute where the witness is present in Court.

By Mr. Hart: Well, I will put Mr. Drashman on the witness stand, if you insist.

By Mr. Skinker: I don't insist. I just say you can't use the deposition.

By the Court: You may put him on.

By Mr. Hart: Do you mean any of the deposition of the witnesses I have been reading in the courtroom?

By Mr. Skinker: No, sir.

JOHN JOSEPH DRASHMAN, of lawful age, being produced, sworn and examined on the part of the plaintiff, testified as follows, to-wit:

Direct examination.

By Mr. Edwards:

Q. Will you state your name in full?

A. John Joseph Drashman.

Q. Where do you live, Mr. Drashman?

A. Memphis, Tennessee.

Q. By whom are you employed?

A. The Frisco Railroad.

Q. That is the Frisco Trustees, now under trusteeship?

A. Yes, sir.

Q. The defendant in this case?

A. Yes, sir.

Q. Now, how long have you worked for the Frisco Railroad?

A. It was forty years the second day of February.

Q. What do you do for them?

A. My title is coach foreman. I have charge of the passenger equipment, supervising cleaning, repairs—anything in connection with the passenger cars.

[fol. 224] Q. And where are you stationed to perform those duties?

A. Well, in two places, at the Grand Central Station, and the Yale yards.

Q. That is in Memphis, Tennessee?

A. Yes, sir.

Q. When you say "Grand Central Station," do you mean the Grand Central Station yards, as well as the station proper?

A. Anywhere where a Frisco train would be stationed in the yards.

Q. Wherever a Frisco train would be stationed in the yards?

A. Yes, sir.

Q. And that is, passenger trains?

A. Yes, sir.

Q. How long have you had the duties of taking care of the Frisco passenger trains?

(No response.)

Q. Has that been your duty all along?

A. Yes, sir.

Q. Ever since you have been employed by them?

A. Yes, sir.

Q. Are you in charge of that—do you have men working under your supervision now?

A. Yes, sir.

Q. How many men do you have working under your supervision there?

A. I have eighty-six.

Q. Eighty-six?

A. Yes, sir.

Q. And what do those men do generally, those eighty-six?

A. Coach cleaning, repairing coaches, inspecting, and just maintain the passenger equipment.

Q. Maintain the passenger equipment?

A. Yes, sir.

Q. Does that also include mail cars?

A. Yes, sir; that is considered a passenger car.

Q. Does it have anything to do with the engines and tenders?

A. No, sir.

Q. Now, in December, 1939, what were the times of your employment, what time did you go to work, and what time did you quit?

A. Well, I haven't a specified time, I am on a monthly salary, and along that time I was working anywhere from eighteen to twenty hours a day.

[fol. 225] Q. What time did you usually report for duty?

A. I showed up around the Grand Central Station about six-thirty a. m.

Q. And what time did you usually leave your duties?

A. I left the station around about eight-thirty a. m., and go out to the Yale yards. And then I come back down to the station again around a quarter to six, or six o'clock p. m.

Q. In the evening?

A. Yes, sir.

Q. And that is when you usually quit, about that time?

A. No, sir; whenever there is any rush or any extra work I stay there until that is all completed. Around Christmas time I generally stay there until the last train has departed which is around about eleven o'clock, probably later.

Q. Did you know Lyman Elmer Haney?

A. No, sir; I did not. I did not know him personally.

Q. You understand, I mean Lyman Haney, the switch tender that this suit is for his death?

A. Yes, sir.

Q. You understad who I mean?

A. Yes, sir.

Q. You did not know him?

A. No, sir.

Q. Now, on December 21st, 1939, did you receive a report while you were on duty that Haney had been injured, or a switch tender had been injured there at the station or some place?

A. Yes.

Q. And where were you when you received that report?

A. I was over around the gate, between tracks four and five, remember right.

Q. I will show you what has been identified as Plaintiff's Exhibit 4A, and ask you to look at that map, and tell the jury if you recognize that as being a correct drawing of the lay of the station, and the yards, and the switch yards and tracks, at Memphis, Tennessee, at the Grand Central Station?

A. Yes, sir; that is correct.

Q. You have seen maps like this before, I suppose?

A. Yes.

[fol. 226] Q. Of the station there?

A. Yes, sir; that is right.

Q. Now, can you tell me on this map about where Haney's shanty was, his headquarters that he worked out of?

A. Yes, sir; right in here (indicating), in this location right here.

Q. Will you take your pen and make a cross there where Haney's shanty was located?

A. Yes, sir (indicating).

(Clerk here insert Exhibit with X.)

Q. Now, in order to get a description of where you have just made the cross on this exhibit, that is where Haney's shanty was stationed, wasn't it?

A. Yes, sir.

Q. Where you have just made the cross?

A. Yes, sir; I think that is the right location.

Q. Now, so the jury will understand it, is this cross that you made north or south of the Frisco main line that runs in east to west?

A. It is south.

Q. You mean that the shanty is south?

A. No, sir; the shanty is north of the main line.

Q. That is what I understand, yes.

A. Yes, sir.

Q. The shanty is north of the main line, and what is this line running straight in just west of where you have made the mark, what lines are these that are running into the station?

A. Well, there is several tracks in there, that is what is called the Illinois Central tracks into the depot.

Q. That is what I understood.

A. Yes, sir.

(Objection and argument omitted.)

Q. Now, will you make a cross and mark a "2" on it where the switch was that Haney threw, and that the Frisco backed in on, where you found him, I understand, afterwards—make the cross for that switch.

A. Well, I will tell you this is out of my line, I am no mechanic.

Q. I am just asking you for the lay of the ground.

A. I don't know anything about these tracks, that is not my job.

[fol. 227] Q. I am not asking you to give me the construction of the tracks, I am asking you where this switch was from the shanty, point it out on the map.

A. I couldn't tell you.

Q. Well, which direction was it from the shanty, which direction was the switch where his body was found, from it?

A. It is west.

Q. West?

A. Yes, sir.

Q. Well, this map, the way I am holding it, this portion is west, and this is east and this is north, and this is south, those are the directions. Now, with that explanation can you show me where that switch is located, from the point that you have made there, the shanty?

A. If I remember right, it is right over here, according to this drawing; and this drawing looks like it is just the reverse from where the tracks are in the yards.

Q. Well, you say that the switch where Haney's body was found is west of where his shanty was located, is that right?

A. Yes, sir.

Q. How far west?

A. Well, I should say it is round about one hundred feet from the shanty.

Q. About a hundred feet west, you say?

A. Yes, sir.

Q. And about straight west, isn't it?

A. No, sir; it is kind-of northwest.

Q. Northwest?

A. Yes, sir.

Q. Who did Haney work for?

A. I don't know.

Q. Had you seen Haney before the time of his death?

A. I knew him afterwards, that it was Haney, I did not know the man's name, I had seen him working around there.

Q. How long had you seen him working around there?

A. Well——

Q. (Interrupting) For what space of time before his death?

A. I have no recollection, I didn't pay any attention.

Q. Been regularly for years, several years?

[fol. 228] A. I couldn't say. I see switchmen working around there every day and every night. I didn't pay any attention to them. I know their faces, but I don't know them by name.

Q. About what time was it that you learned of Haney's injury on the night of December——

A. (Interrupting) Around about seven-forty p. m.

Q. And you told me where you were, and about how far were you when you learned of Haney's injury, from where he was injured?

A. I should judge about a half a mile.

Q. And what did you do when you learned of that, did you go to the scene of where Haney's body was found?

A. Our superintendent of terminals came through the gate and wanted me to go with him, and that is what I did.

Q. Well, you went there, didn't you?

A. Yes, sir.

Q. Now, where did you go to?

A. Right straight down the track south from where I was standing.

Q. Went south?

A. Yes, sir.

Q. And where did you find Haney's body?

A. The body had been moved when we got there.

Q. The body had been moved?

A. Yes, sir.

Q. Didn't you see the body?

A. No, sir.

Q. You testified in your deposition that you saw the body, didn't you?

A. No.

Q. Do you remember when your deposition was taken in this case?

A. Yes, sir.

Q. I will ask you if you do not recall these questions being asked you when your deposition was taken, and you giving these answers:

"Q. Were you in the vicinity of where he was injured on December 21, 1939? A. I went down there right after I heard that there was an accident there."

Do you remember testifying to that?

A. Yes, sir.

"Q. And where were you when you heard there was an accident? A. Up around the Stationmaster's office." Do you remember testifying to that, and is that right?

A. I don't remember. I imagine so, if it is that way. [fol. 229] "Q. What did you find when you got down there and where did you go? A. Well, I went down to the switch tender's shanty there."

A. Yes, sir.

Q. Do you remember testifying to that?

A. Yes, sir.

"Q. You went to Haney's switch tender's shanty? A. Yes. Q. And did you go to a switch nearby, where his body was? A. Well I don't think his body was by any switch. It was between the switch stand and——." Do you remember testifying to that?

A. No, sir; I do not.

Q. You don't remember testifying to that?

A. No, sir.

"Q. Well, did you see Haney's body down there? A. Yes." Do you remember testifying to that?

A. No.

Q. Well, do you remember when this deposition was taken?

A. I remember you had me down in the office asking me a lot of questions, but I don't remember stating anything like that.

Q. Don't you remember testifying on May 1st, 1941? Don't you remember testifying on May 1st, in this case?

A. I don't remember the dates. I remember you had me in your office.

Q. Well, Mr. Skinker was there in the office, wasn't he, and he asked you questions, too, didn't he?

A. I don't remember whether he was there or not now.

Q. You don't remember that?

A. No, sir.

Q. Well, then, this question could have been asked you, and you have forgotten it, is that true?

A. Well, it could be; yes, sir.

Q. Before you testified in this case you held up your hand and swore to tell the truth and the whole truth?

A. Yes, sir; that is what I am doing now.

Q. And you tried to tell the truth when you gave this deposition?

A. As far as I can remember, I tried to tell the truth about it.

Q. (Reading) "Q. Well, did you see Haney's body down there? A. Yes. Q. And how far was it from the Frisco [fol. 230] switch, from the main line? A. I don't know, I didn't measure it. Q. Well, how far was it from the Frisco tracks? A. I did not measure that." Do you remember testifying to that?

A. No, I do not.

Q. Is that true?

A. Which?

Q. What I have just read.

A. No, sir; it is not.

Q. It is not true that you looked at the body?

A. No, sir; I did not see the body.

Q. "Q. What would be your best judgment? A. About six feet." Do you remember testifying to that?

A. No.

Q. Did you testify to that?

A. No, I did not.

Q. All right. "Q. About six feet. Do you refer to the body or the head or what part of Haney's body would you refer to? A. Well, I think the whole body." Do you remember swearing to that?

A. Are you sure that is my deposition?

Q. There is no question about it. You can look if you want to look at it. There is your name on the page before that, it says on page 189 "John Joseph Drashman, of lawful age, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, deposes and says on the part of the plaintiff as follows: Direct Examination by Mr. Edwards." Do you remember being sworn?

A. Yes.

Q. Now, the next question: "Q. What would be your best judgment?" That refers to where the body was. "A. About six feet." That was from the Frisco tracks, about six feet. "Q. Do you refer to the body or the head or what part of Haney's body would you refer to? A. Well,

I think the whole body." Do you remember swearing to that?

A. No.

Q. Would you say that you did testify to that, or that you did not?

A. I did not.

Q. The next question: "Q. The whole body. And which way was Haney's body pointing when you first saw it? [fol. 231] A. I believe it was west." Do you remember testifying to that?

A. No, sir.

Q. "Q. Pointed west. And was he lying on his back or on his face or side or how? A. On his face, if I remember right." Do you remember testifying to that?

A. No. The only thing I testified to is as to the location where the body was supposed to have been.

Q. All right, just listen: "Q. Lying on his face? A. Yes. Q. With his back up? A. Yes. Q. And you think his head was faced west? A. Yes. Q. Are you sure about that? A. No, I am not sure. I think it was. Q. Well, I just want to know if you are reasonably sure. A. No, I am not sure, because I didn't pay that much attention to it." Do you remember testifying to that?

A. No.

Q. Is your memory a blank on what you gave?

A. No, sir; I don't think so.

Q. Very well, I will read the next one: "Q. Well, I just want to know if you are reasonably sure. A. No, I am not sure, because I didn't pay that much attention to it. Q. He might have faced east, then? A. Yes, could have been. Q. I see. Who was there when you arrived where you found Mr. Haney, as you say? A. Well, Mr. Young and I went down together, our superintendent of the terminals." Did you testify to that?

A. Yes, we went down together.

Q. Do you remember testifying to that in this deposition?

A. We went together; yes, sir.

Q. All right, but do you remember testifying to that?

A. Yes, sir.

Q. You do?

A. Yes, sir; I do.

Q. Now, that is true in the deposition, isn't it?

A. That is true there; yes, sir.

Q. "Q. And who was there when you arrived there? A. Well, I don't know, there were several parties there, and I think this I. C. switch engine foreman, Brusco, he was [fol. 232] there, and I think there were several of the city plainclothes men were there." Do you remember testifying to that?

A. Yes, sir.

Q. And that is true?

A. Yes, sir; that is true.

Q. "Q. These men were there when you got there, that you are speaking of? A. Yes."

(Objection and argument omitted.)

Q. Mr. Drashman, who have you been talking to about this since this deposition has been given?

A. Well, I have not been talking to anyone. I had forgotten about the case all together. And I am trying to tell you that I do not remember ever stating that I saw the body, which I did not. I did tell you that I saw the location where the body was supposed to have been.

By Mr. Edwards: Well, you have told me that, these questions that I have read to you, that you do not remember, and now you say that you did not hear about this case, or have not talked to anybody about it since the time this deposition was given, until recently?

A. Until the last day or two, yesterday to be exact.

Q. Recently who have you talked to about this case?

A. Well, Mr. Skinker had me in his office yesterday.

Q. Did you go over the case with him yesterday?

A. Not all of the way through; no sir.

Q. Did you discuss what you were going to testify to here in Court?

A. No, sir; he told me he wanted me to get up and tell the truth just to the best of my recollection, and that is what I am trying to do.

Q. Is that all he told you?

A. Yes, sir.

Q. And that is all you and he talked about?

A. Yes, sir.

Q. Well, I will ask you more of these questions: "Q. Did you notice anything about Haney's head or body that indicated he had been injured? A. Well, I saw what looked to me like a hole knocked in the back of his head,

like someone had struck him with a blunt instrument of [fol. 233] some kind." Did you testify to that in your deposition?

A. No, sir.

Q. Is that true?

A. I don't know.

Q. I say, is this true, what I have read?

A. True in what way?

Q. What I read, is that true?

A. I didn't make any such statement as that to you.

Q. You say then what I have read to you is not true?

A. No, as far as my statement is concerned; no, sir.

Q. And you do not remember testifying to it?

A. No, sir; I do not.

Q. "Q. What kind of a wound was that on the back of Haney's head? A. Well, it looked like a caved-in place, it wasn't exactly a cut place, it looked like someone had hit him with a club or something." Do you remember testifying to that?

A. No, sir.

Q. "Q. Could that have been made with a round pipe?

A. Well, it could have been, yes. Q. Did you see Haney's

face? A. No. Q. Was he turned over so you could look

at his face? A. Not while I was there. Q. How long did

you remain there? A. Well, I imagine about three min-

utes." Do you remember testifying to that?

A. You had me mixed up with someone else.

Q. I am just reading from your deposition. Do you remember that?

A. I do not.

Q. And is that true, what I have just read?

A. No, sir.

Q. It is not true?

A. No, sir.

Q. "Q. And then did you ever return to the place? A.

Yes, after the body was moved. Q. Oh, after they moved

the body. Did you see any blood around there where—

close there? A. Yes, there was a spot of blood about six

inches across." Do you remember testifying to that?

A. I saw that; yes, sir.

Q. And is that true?

A. Yes, sir.

Q. Now, at the bottom of page 193, Mr. Skinker, about [fol. 234] the middle of the page. "Q. Now, which way from

this switch did you notice this blood, east or west of this switch? A. It was south, south of the rail, I don't know how close to the switch." Did you testify to that?

A. I imagine I did, if you say so.

Q. No, I am just asking you, you are the man, you are the man testifying, I am not testifying. Did you testify to what I have just read?

A. I know what distance it was, about; yes, sir.

Q. Well, is that true, what I have read?

A. Yes, sir.

Q. And did you so testify?

A. I don't remember that part of it. I don't think I testified to any of that stuff you have there.

Q. Don't let me interrupt you. If you want to explain anything go ahead. "Q. How close was that blood to his body? A. That was after his body was removed? Q. How is that? A. That was after his body was removed that I saw the blood."

A. That is right.

Q. You testified to that?

A. That is correct.

Q. "Q. Did you see any blood there while the body was there? A. No. Q. You didn't? A. No, not except on his head there." Do you remember testifying to that?

A. No.

Q. "Q. You did not? A. No, not except on his head there. Q. When did you return there after the body was removed? The next day? A. No, the same night. Q. That night? Did anybody return with you? A. Yes. Q. Who was that? A. Mr. Young and I were down there together."

A. That is right.

Q. You remember testifying to that?

A. Yes, sir.

Q. "Q. Is there a mound north of the Frisco tracks there at the switch? A. Well, there may be what you call a mound; there is a pile of dirt piled up there. Q. And where is this pile of dirt with reference to the switch, which way from it? A. I don't know. Q. Do you know how high that mound of dirt is? A. Well, I imagine about [fol. 235] two feet above the rail. Q. About two feet above the rail. And about how long does that extend along there? A. Oh, several feet. Q. Does it extend east and west of the switch? A. Both east and west of the tracks, yes." Do you remember testifying to that?

A. Yes, sir.

Q. And that is true, isn't it?

A. Yes, sir.

Q. "Q. Did you examine Train No. 106 after Haney was found? A. Yes, sir. Q. Where did you examine it? A. In the station after it was backed in under the shed. Q. In the station? A. Yes, sir. Q. Was that after you heard Haney was killed or hurt? A. After I was down to the scene of the accident I went back. Q. You mean after you had gone down and seen Haney? A. Yes, sir. Q. And you came back? A. Yes." Do you remember testifying to that?

A. No, I remember telling you I came back and made an inspection of the equipment.

Q. Is what I have read true?

A. No, partially it is not.

Q. "Q. You made an inspection, I believe, you just told me, after you had seen Haney's body where he was injured up there? A. Yes." Do you remember testifying to that?

A. I remember telling you I made an inspection of the equipment after I left the scene of the accident, but I did not tell you I saw the body. I never did see the body.

Q. You never did see Haney's body?

A. No, sir.

Q. Not up to this time at all?

A. No, sir.

Q. Then what they have in this deposition, what I have read to you about seeing the body, is not true, is that so?

A. That is right.

Q. And you swear that you did not so testify?

A. Yes, sir.

Q. You swear that you did not so testify in this deposition?

A. I never did tell you that I saw the body at any time.

Q. And these places where I have read in this deposition [fol. 236] tion, where you say you saw the body, that is not true?

A. No, sir; it is not.

Q. And you did not so testify?

A. No, sir; I did not.

Q. Page 198, starting at the bottom of the page—first, did you examine one of the sides of this train more closely than you did the other side of the Frisco train 106?

(Objection and argument omitted.)

By Mr. Skinker: Plaintiff's attorney, Mr. Edwards, in examining the witness, Drashman, in regard to what said witness stated in his deposition in this case, has reached a point in said deposition approximately at the top of page 199 of said deposition. And the defendants want to read page 199 and approximately the first half of page 200, because they deal with matters which should not be read to the jury. And after reading said portion of the deposition, we will then state to your Honor our objections to the reading of such questions and answers in the presence of the jury. Now, beginning at the top of page 199 of said deposition, being part of the deposition of witness Drashman, I will read as follows:

“Q. You examined the fireman's side very close? A. Yes.

Q. And you didn't examine the engineer's side quite so close? A. Not so close, no.

Q. What was that difference? A. Well, because someone said that they thought that train No. 106 backing into Grand Central Station is what struck this man.

Q. You mean Haney? A. Yes, sir.

Q. That is, someone told you that at the scene of the accident? A. No, he didn't see the accident, I heard someone say that is what happened.

Mr. Skinker: Just a moment. We object to that and ask it be stricken out as purely hearsay.

A. That is all—I didn't get who it was.

[fol. 237] Q. (By Mr. Edwards.) All right, who told you that, and when? A. I don't know who it was, I just heard them talking around there.

Q. Who did you hear talk and where? A. I don't know who it was, down where Haney's body was laying on the ground.

Q. Where Haney's body was laying on the ground? A. Yes, sir.

Q. That is where you heard this statement made? A. Yes, sir.

Q. Somebody said they thought something sticking out on the train hit him, is that right? A. That is what I heard there.

Q. That is what you heard there?

Mr. Skinker: Just a moment, I want to object to that as hearsay and improper and may it go to all similar questions?

By Mr. Edwards: Yes.

Q. (By Mr. Edwards) That was down there when you first went down and saw Haney's body? A. Yes.

Q. You heard someone there where the body was, saying that they thought something sticking out on the train hit him, is that right? A. That is right."

(Objection and argument omitted.)

By Mr. Skinker: I think if your Honor allows this line of objection to be considered in, it will not be necessary for us to repeat the objection.

By the Court: Whichever way you gentlemen want. If you can agree on that, all right, if you can't, we will rule on each question as it is asked. Bring the jury down, Mr. Sheriff.

(The further following proceedings were then had in the presence of the jury.)

[fol. 238] By Mr. Edwards (to witness Drashman): Now, did you examine this train, Frisco passenger train number 106 that came in to the station at Memphis there on the evening of December 21st, 1939, after that train came in?

A. Yes, sir; I made an examination of it.

Q. Did you examine both sides of the train?

A. Yes, sir.

Q. Did you examine that which would be the fireman's side of that train?

A. Yes, sir.

Q. I say, which would be the fireman's that would be the left side, wouldn't it?

A. Yes, sir.

Q. Did you examine the engineer's side of that passenger train?

A. I made an inspection of that train first, and then I went over on the right side, and the car inspector, Armand,

he was making an inspection of what we call the right side, and then he and I went back on the left side again, yes.

Q. Did you particularly examine the left side of that train?

A. No more than I did the right.

Q. Well, I will call your attention to your deposition about that. Listen to these questions and answers, Mr. Drashman. "Q. Well, you spoke of examining this train, did you examine the right side, the engineer's side? A. Yes, I went around both sides, but particularly on the engineer's—on the—it was on the fireman's side. Q. Oh, you particularly examined the firemen's side? A. Yes." Do you remember answering those questions in that manner in your deposition?

A. Yes, you asked me if I made an inspection, and I told you yes.

Q. Well, I have just read to you the last question and answer, "Oh, you particularly examined the fireman's side? A. Yes." Don't you recall testifying to that?

A. I remember telling you I made an inspection of it; yes, sir.

[fol. 239] Q. Don't you remember telling me that you particularly examined the fireman's side?

A. No, sir; I do not.

Q. Well, what I have just read to you, did you so testify in that deposition?

A. I don't remember it if I did.

Q. You may have testified to it?

A. I may have.

Q. Well, is it true, what I have just read to you?

A. That I made an inspection of the train; yes, sir.

Q. What I have read to you, is that true?

A. No.

Q. All right. Now, the next question along that same line: "Q. Now, what do you mean particularly examined the fireman's side—did you examine that better than you did the engineer's side? A. I looked at that very close." Did you so testify?

A. Yes, sir; I did.

Q. And that is true, is it?

A. Yes, that is it.

Q. Why did you examine one side closer than the other?

A. Do you want me to answer that?

Q. Yes, sir.

By Mr. Skinker: We object to his answering that question, if it deals with any hearsay testimony, or of any matters he may have heard, particularly if it deals with any party's expression or opinion as to what their thought might be as to how the accident occurred.

By Mr. Edwards: I can't anticipate what this witness will say, Mr. Skinker.

By Mr. Skinker: Let me finish; and that such testimony would be hearsay and incompetent, and we therefore object to his going into that question at all.

By Mr. Gentry: I object to that question because it is very evident in view of what is contained in the deposition of this witness to which your Honor's attention has been called, and which Mr. Edwards now has in his hand and is endeavoring to bring out from this witness the same matter in the deposition, to which we have objected, and therefore I object to it because it is evident he is asking the question to get his reason and bring in this hearsay testimony as the reason.

[fol. 240] By Mr. Edwards: I don't think that is evident. I don't think you can anticipate what this witness will say, unless you know.

By Mr. Skinker: May I join in Mr. Gentry's objection, and include that in my own?

The Court: Yes, sir; objection overruled.

To which ruling of the Court the defendants, and each of them, by counsel, then and there duly excepted at the time and still continue to except.

(Question read by Reporter: Why did you examine one side closer than the other?)

A. Because I was told by one of the switchmen, I believe, if I remember right, that this man was supposed to have been struck by something protruding on the side of this train.

By Mr. Skinker: Now, we object to that answer, and ask that it be stricken, because it is purely hearsay, and further, because it is not identified as to the person who is supposed to have made the statement, and it deals with an expression or a conclusion on the part of the person who made the statement. There is no showing that the person who made the statement was present or saw what happened. The person who made the statement would be invading the

province of the jury in stating a conclusion of his own, in making the statement, and the answer is wholly improper, and the hearsay testimony should be stricken out.

By Mr. Gentry: We also object to it for the same reasons, and ask that it be stricken.

By Mr. Edwards: I want to ask this witness where he got that information.

By the Witness: Your Honor, could I explain?

By the Court: No, just answer the questions.

By Mr. Skinker: You are overruling my objection?

By the Court: No, are you through?

[fol. 241] By Mr. Edwards: I want to find out where he got that.

By the Court: Are you through with that particular question?

By Mr. Edwards: No, sir; I want to pursue that some more. (To witness) I take it that it was a railroad employee, a brakeman or switchman, is that it, said that?

A. A switchman, I think.

Q. And where did he make that statement to you?

A. Out there on the ground where this man was supposed to have been struck.

Q. Haney?

A. Yes, sir.

Q. Was that when you went down there to where this switch was that Haney had thrown to let the Frisco train in at that time?

A. It was down there in that location; yes, sir.

Q. It was down there at the time you first went down there to investigate when you heard that Haney was hurt?

A. I didn't go down there but one time, but that was the time; yes, sir.

Q. And is that the time?

A. Yes, sir.

Q. Was it made down there at the switch which Haney threw to let this Frisco train in?

A. No, sir; it wasn't at the switch, it was in that location around there, see?

Q. Well now, do you know who this switchman was?

A. I do not.

Q. Could he have been a switchman for the Frisco Railroad?

A. No, sir; I think it was the Illinois Central man, if I remember right, the I. C. man.

Q. When you say "I. C.," do you mean the Illinois Central Railroad?

A. The Illinois Central Railroad; yes, sir.

Q. I will ask one more question, and then you make your foundation. Wasn't this statement made, that you have just stated, down there when you went down there and saw Haney's body lying there at the switch; isn't that true?

A. No, sir.

[fol. 242] By Mr. Edwards: Then, your Honor please, I will ask to read this part of the deposition. Now, if you want to make an objection to the reading of it—

(Objection and argument omitted.)

By Mr. Gentry: I want to renew my objection to it, for the reasons stated.

By Mr. Skinner: The defendant, Frisco, renews its objection for the reasons already stated.

By the Court: Very well, the same ruling.

To which ruling of the Court the defendants, and each of them, by counsel, then and there duly excepted at the time and still continue to except.

By Mr. Edwards: Do you recall testifying to what I will read to you, on page 199? "Q. And you didn't examine the engineer's side quite so close? A. Not so close, no." Do you remember testifying to that?

A. Yes, I do.

Q. And that is true, isn't it?

A. Yes, sir.

Q. "Why was that difference? A. Well, because someone said that they thought that train No. 106 backing into Grand Central Station is what struck this man. Q. You mean Haney? A. Yes." Do you remember testifying to that?

A. Yes, sir.

Q. That is true, isn't it?

A. If your Honor would allow me to explain—

By the Court: (Interrupting) Just answer the question.

By Mr. Edwards:

Q. That is true, isn't it?

A. Yes, sir.

Q. The next question: "Q. That is, someone told you that at the scene of the accident? A. No, he didn't see the accident, I heard someone say that is what happened." Did you so testify?

A. Yes.

Q. And that is true, isn't it?

A. Yes, sir.

By the Court: Now, do you want to explain your answer?

By the Witness: Yes, sir.

[fol. 243] By Mr. Edwards: Explain any answer you want to.

By the Witness: What I was going to do was to explain why I made a closer inspection on one side than the other. It seems like he is stressing very heavily on that.

By Mr. Skinker: May it be understood our objections are renewed to all of these questions with reference to this hearsay testimony, what he heard somebody say?

By the Court: The same ruling.

By Mr. Skinker: And we will not have to make objections every time.

By the Court: Yes, sir; the same ruling.

To which ruling of the Court defendants, by their counsel, and each of them, then and there duly excepted at the time and still continue to except.

By the Witness: I want to go into detail and show why I have to make a closer inspection of one side than the other. If that side is in an accident—

By Mr. Gentry: (Interrupting) I object to going any further on that.

By Mr. Edwards: Do you want to hear what he wants to explain?

By Mr. Skinker: We will object to that.

By Mr. Edwards: All right, we will proceed then. Now, Mr. Skinker, there is a further answer to that same question, where you made an objection.

By Mr. Skinker: Just a moment, we object to that. We object to that answer and ask it be stricken out as purely hearsay, "That is all—I didn't get who it was." That is really part of the other.

By Mr. Gentry: He says, "I didn't get who it was."

By Mr. Edwards: The witness says, "That is all," and Mr. Skinker interrupted the witness, and the witness said, "That is all—I didn't get who it was." You testified to that, didn't you?

A. Yes.

Q. And that is true, isn't it?

A. Yes.

[fol. 244] Q. "Q. (By Mr. Edwards) All right, who told you that, and when? A. I don't know who it was, I just heard them talking around there." "Q. Who did you hear talk and where? A. I don't know who it was, down where Haney's body was laying on the ground." Do you remember testifying to that?

A. No, I didn't mention the body.

Q. And what I have read to you then, you did not testify to?

A. No, sir.

Q. You deny that you testified to that?

A. Yes, sir; in those words that you have; yes sir.

Q. The next question: "Q. Where Haney's body was laying on the ground? A. Yes. Q. That is where you heard this statement made? A. Yes, sir." Do you remember testifying to that?

A. No, sir.

Q. "Q. Somebody said they thought something sticking out on the train hit him, is that right? A. That is what I heard there."

A. That is right.

Q. You testified to that?

A. Yes, sir.

Q. "Q. That is what you heard there." Now, shall I read the objection, Mr. Skinker?

By Mr. Skinker: Yes, sir.

By Mr. Edwards (reading): "Mr. Skinker: Just a moment; I want to object to that as hearsay and improper and may it go to all similar questions? By Mr. Edwards: Yes." Now, the next question: "Q. That was down there when you first went down and saw Haney's body? A. Yes." Do you remember testifying to that?

A. No.

Q. That is when you first went down there, is that true?

A. I did not go down there but one time.

Q. Well, part of that answer is right, isn't it?

A. Yes, sir.

Q. When you first went down there?

A. Yes, sir.

Q. That is where you heard this statement made?

A. Yes, sir.

Q. "Q. You heard someone there where the body was, saying that they thought something sticking out on the [fol. 245] train hit him, is that right? A. That is right." Did you so testify?

A. Yes, sir.

Q. And that is true, isn't it?

A. Yes, sir.

Q. "Q. When you heard that you went back and examined the train? A. That is right." Is that right?

A. That is right.

Q. And you so testified?

A. Yes, sir.

Q. "Q. Now, is it possible, this mail hook could have hit him?" Wait a minute, I did not lay the foundation.

(Objection and argument omitted.)

By Mr. Edwards: All of the matters that I have just asked you about, the statements that you say were made, as I understand, were made down there near that switch that Haney threw to let the Frisco train in?

A. Yes, sir.

By Mr. Edwards: Now, Your Honor, might I offer the excerpts I have read from the deposition of this witness into evidence without re-reading them, as a part of the examination?

By Mr. Skinker: I think they are already in evidence.

By Mr. Edwards: I want that understood. The questions I have read and you have checked me, that they were correctly read and as set out in this deposition.

By Mr. Skinker: Yes, sir; I think so.

By Mr. Edwards: I want to offer those statements in evidence as part of the examination of this witness.

By the Court: The record may so show.

(Clerk will here copy said questions and answers.)

Said questions and answers are hereinabove set out.

By Mr. Edwards (to Witness): Now, this train, Frisco train No. 106, had in it a mail coach, didn't it?

A. Yes, sir; a mail car.

Q. That mail coach was near the engine, wasn't it?

A. Yes, sir.

Q. That mail coach has on it, on the side of it, iron [fol. 246] hooks, mail hooks, doesn't it?

A. We call them mail pouch catchers.

Q. Some people call them mail hooks?

A. Yes, sir.

Q. They are iron, and tell the Jury about what size they are, how large is that round part of that iron?

A. You mean the lower or upper part?

Q. The lower part.

A. About five-eighths of an inch.

Q. About five-eighths of an inch?

A. Yes, sir.

Q. And they are round?

A. Yes, sir; got a little curly tail on the bottom.

Q. And that little curly tail is round, isn't it?

A. Yes, sir.

Q. Now, when the Train 106 is backing, those hooks are pointed—I mean the hook part—is pointed towards the front and towards the engine?

A. It is pointed this way backing up (indicating).

Q. Those hooks are not fastened to the side of the train, are they?

A. Yes, sir; they fasten on a pivot.

Q. They swing loose on the side of the train?

A. No, sir; they do not swing unless you pull them down.

Q. Well, they are not fastened to the side of the train, are they?

A. No, sir.

Q. Now, tell the Jury how far out those hooks swing from the side of that train—how far out can they swing from the side of that train?

A. What do you mean—when they are raised up?

Q. Yes, sir.

A. When the mail clerk inside of the car pulls down on the handle, it raises vertically out. In other words, it sticks out twenty-five inches, two foot and one inch. But you have to pull down on the handle on the inside of the car to swing it out.

Q. Well, some of them swing out about three feet, don't they, from the side of the train?

A. No, sir.

Q. Don't you recall testifying in your deposition, when I asked you about this question: "Q. Did you find this mail coach, on this mail coach, did it have any mail hook [fol. 247] on it? A. Yes, one on each side of the car." Do you remember testifying to that?

A. Yes, sir, that is right.

Q. "Q. One on each side. What kind of a hook is that, can you describe that? A. Yes, it is iron, V-shaped."

A. Yes, sir, that is right.

Q. "Q. And how does that work? A. One side of it is fastened through brackets on each side of the door posts, and the other hangs down against the side of the car, with a handle on top." That is right, isn't it?

A. Yes, sir.

Q. You testified to that, and that is true, isn't it?

A. Yes, sir.

Q. "Q. Can that be extended out to the side of the train? A. Yes." That is right, isn't it?

A. Yes, sir.

Q. "Q. How far out to the side of the train can that mail hook be extended? A. You can swing it out three feet." Isn't that true?

A. No, sir.

Q. Well, do you remember so testifying in this deposition?

A. I don't think I told you three feet, because I know better than that.

Q. All right. "Q. Swing out three feet? A. To the tip end of the hook." Do you remember so testifying?

A. No, sir.

Q. Is that true?

A. No, sir; it is not.

Q. Do you say that you did not testify to what I read?

A. Twenty-six inches, I know that, and I have known that for years.

Q. You did not testify that it swung out three feet?

A. No, sir; I did not tell you that.

Q. They are loose so that you can go along with your hand on the side of the train and raise them up, can't you?

A. With some effort, yes, sir.

Q. Well, it don't take much effort; you can take the tip of your finger and swing them around, can't you?

A. No, sir.

Q. You can't do that?

A. No, sir; there is too much weight to lift that with your finger.

[fol. 248] Q. Do you remember testifying to that on page 206, Mr. Drashman, well it is near the bottom of page 205:

"Q. Isn't it a fact, Mr. Drashman, you can go along and raise these mail hooks up on the side of the train? A.

No, you can't raise them. Q. You can't? A. No. Q. I raised about six of them up last night. A. Probably you

can, you are a little taller than the average man—but how high could you raise them? Q. Oh, raise them up,

taking them all, they are not fastened, they are not fastened down, are they? A. No. Q. These mail hooks are not

fastened down, are they? A. No, sir." Now, do you recall testifying that I could raise them up because I was a little taller or higher than you?

A. Yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

Q. Now, there was a mound north of that Frisco track, next to that switch that Haney had just thrown before he was killed, wasn't there?

A. Yes, sir; yes, there is a little raised place there.

Q. Well, that mound was about two feet high, wasn't it?

A. I didn't measure it, I couldn't say.

Q. Well, in your best judgment.

A. It was about eighteen to twenty inches, the best I can say.

Q. Above the rail?

A. Yes, sir.

Q. That mound north of the Frisco tracks?

A. Yes, sir.

Q. It was in that condition the night you went down there after Haney was killed, wasn't it?

A. That is right.

By Mr. Edwards: You may take the witness.

Cross-examination.

By Mr. Skinker:

Q. Mr. Drashman, you were up in the station, were you, this evening, on this particular evening of December 21st, 1939?

A. Yes, sir.

Q. Now, that is four years ago this past December?

A. Yes, sir.

Q. And you recall going down to the scene of the accident, do you?

A. Yes, sir; I recall that.

[fol. 249] Q. And how long were you there?

A. That night?

Q. Yes, at the scene of the accident.

A. Oh, I don't think over fifteen or twenty minutes at the most, maybe not that long.

Q. You were not there a great while, were you?

A. No, sir; not very long.

By Mr. Edwards: I object to the witness' conclusion, he said fifteen or twenty minutes.

By Mr. Skinker: Did you then go back to the station?

A. Yes, sir.

Q. Did you inspect this train yourself, did you go over the train yourself?

A. I started to inspecting one side by myself, and then I met the car inspector.

Q. What was his name?

A. L. J. Armand.

Q. Is he living or dead, Mr. Drashman?

A. No, sir; he is dead.

Q. Was that a routine inspection that Mr. Armand was making, in other words, the car inspector would go over the train when it gets into Memphis?

A. Every night, yes, sir.

Q. Does that inspector look for hot boxes and things of that kind along the side of the train?

A. Yes, sir; for anything, anything that might be defective around the train.

Q. Is that the man you see around passenger stations at night?

A. Yes.

Q. Going along with a lantern and flashing it at the wheels and the sides of the train?

A. Yes, sir.

Q. Armand was there inspecting the train when you got back, was he?

A. Yes, sir.

Q. And did you continue to inspect with him, or did you make a separate inspection?

A. Continued with him, and he and I went back around to the left side of the train.

Q. When there is anyone found in the yards under circumstances like you have described, where there has been [fol. 250] a train gone by, and there is someone there, with any possibility of the train being involved, is it your duty to make an inspection?

A. Yes, sir; we have what we call a Form 171, regular equipment inspection form, that we have to make a report on regardless of whether that train was involved in it or not.

Q. And did you go ahead with that inspection then; yourself, at that time?

A. Armand and I together, we made that inspection, yes, sir, and made out the form together.

Q. Did you observe the sides of the train?

A. Yes, sir.

Q. On both sides?

A. Yes, sir.

Q. Did you observe the mail car?

A. Yes, sir.

Q. Do you recall where the mail car was with reference to the engine?

A. It was right behind the tank.

Q. At the head end?

A. Towards the rear of the engine; yes, sir.

Q. Now, did you find anything on either side of the train in the way of an object protruding out from the side of the train?

A. No, sir.

Q. Any rods, stick or wire or any kind of an object?

A. No, sir; we looked for anything that might be or would be sticking out.

Q. What kind of doors are there on the baggage cars, and what kind on the mail cars?

A. They are sliding doors on the inside of the car, that is, six inches from the outside.

Q. Sliding doors on the inside of the car?

A. Yes, sir; you have to slide them back.

Q. Slide back and forth along the inside wall of the car?

A. Yes, sir.

Q. Now, when you get to the coaches and the Pullman cars, they have what is commonly called a vestibule door?

A. Yes, sir.

Q. And does that open towards the inside?

[fol. 251] A. Yes, sir; door swings towards the inside before you can raise the trap door.

Q. There are no doors on a passenger train that swing towards the outside, are there?

A. No, sir; not on any passenger car.

Q. What is the height of the mail arm above the top of the rails, that is the mail arm, as I understand you, it is on a bracket there, across the door of the car, isn't it?

A. Yes, sir.

Q. And it is worked by the United States postal man on the inside pressing down a handle, and that brings up the mail arm; is that right?

A. No, sir; he has to open the door, you see.

Q. Yes.

A. And then he pulls down on the handle.

Q. He pulls down on the handle on the inside of the car?

A. He has a handle about eighteen inches long on top of this mail pouch catcher. In other words, there is a rod on top that fastens through two brackets on each side of the door posts, and this handle is about twelve inches away from the back post, and he pulls down, and that swings the bottom part of the catcher out.

Q. Do you mean outside of the car?

A. Yes, sir.

Q. He has to hold the handle down?

A. Well, if he don't, the catcher goes right back against the side of the car.

Q. Is the mail arm itself weighted?

A. Yes, sir; the weight of these rods at the bottom, and there is a casing at the handle; all that weight is hanging below the rod that goes through the brackets, and that weight is on—that is what swings it back to the body of the car.

Q. Now, what you call the vestibule door, where you start up the steps, there is an iron what might be called a grab iron, up and down?

A. Yes, sir.

Q. That extends out from the side of the coach?

A. One on each side of the doorway.

[fol. 252] Q. And is that true on Pullman cars and coaches both?

A. Yes, sir.

Q. That is there for a passenger or anyone to get hold of starting up the steps?

A. Yes, sir; that is right.

Q. How far does that stick out from the side of the train, do you know?

A. Three inches.

Q. And is that the normal standard?

A. Yes, sir.

Q. That is true with passenger equipment, is it?

A. Yes, sir; it is a government requirement that we must have a two and a half inch clearance on the inside of the handles.

Q. And is that the farthest protrusion out from the side of a railway passenger train, that is, in a normal train?

A. Yes, sir.

Q. What about the mail arm itself as hanging down by the side of the mail car when it is not extended out, does that protrude out as far as the hand rail of the coaches?

A. It rests against the hand rail. You see, if this was the hand rail, and this arm rests against that all of the time.

Q. Is there a hand rail on the mail car door?

A. Yes, sir; on each side.

Q. And which extends out farther, the hand rail or the mail catcher itself?

A. The mail catcher stands out five-eighths of an inch, which is the clearance of the iron itself.

Q. So the mail—

A. (Interrupting) It is resting against the grab iron and it extends out five-eighths, of an inch farther.

Q. Now, this bracket you have described which holds the mail arm, how high is that above the rails in standard equipment—is there a standard fixture for that?

A. Yes, sir.

Q. What is that standard?

A. From the top of the tie it is eight foot one and a half inches, from the top of the tie to the center part of the bracket.

Q. That holds the mail arm?

A. Yes, sir.

[fol. 253] Q. And so when the mail arm is extended out horizontal to the ground, like it would be in catching a mail pouch, the mail arm itself would be a little over eight feet above the top of the ties?

A. Yes, sir; of the ground itself, the ground is level with the ties as a rule.

Q. So it would be a little over eight feet above the top of the ground if it is extended straight out?

A. Yes, sir.

By Mr. Skinker: That is all.

Cross-examination.

By Mr. Gentry:

Q. Mr. Drashman, Mr. Edwards asked you a while ago if that dump or dirt or whatever it was that was north of the track, was next to that switch that we have been talking about. You did not mean to say that it came right up against the switch, did you?

A. No, sir.

Q. How far back was the bottom of the dump from the switch?

A. Well, Mr. Young and I stepped it off that night, and if I remember right it was about fifteen feet away from the switch.

Q. And the dump itself, you say you thought was about how high—eighteen or twenty inches, did you say?

A. About that; yes, sir.

Q. Now, as to whatever statements were made down there, when you and Mr. Young were down there, and at any time while you were down there near the switch, you do not know who made them, do you?

A. No, sir; I do not.

Q. And you don't know whether the person—

By Mr. Edwards (interrupting): Who are you referring to—when he was down at the switch where Haney's body was?

By Mr. Gentry: At the time he says he went down there, when he learned Haney had been hurt, he says he went down there only once.

By Mr. Edwards: And that is the switch that Haney threw there?

[fol. 254] By Mr. Gentry: Yes, sir; that is the switch I am talking about. (To Witness) You understood that was the switch I was talking about, didn't you?

A. Yes, sir.

Q. All right now. Whatever statements were made to you by people who came up into that crowd, were made by someone, but you don't know who it was?

A. That is right.

Q. And you don't know whether the person or persons that made such statement or statements were present when the accident happened or not, do you?

A. No, sir; I do not.

Q. And you don't know whether they claimed to have been present, do you?

A. No, sir.

Q. And you do not know how soon they got there after the accident was over, do you?

A. No, sir.

Q. Now, where were you when you got your first information about Mr. Haney being hurt?

A. Well, I was around the station. I was around the station master's gate. I thought I was around the gate, and then Mr. Young came through, and he says, "Let's go out on Broadway. I understand Haney got hurt."

Q. That was the first information you had?

A. Yes, sir.

Q. How did you get down there?

A. We walked down there.

Q. How far is that?

A. About a half a mile from the station gates.

Q. About half a mile?

A. Yes, sir.

Q. And you and he walked down there to that point?

A. Yes, sir.

By Mr. Gentry: That is all.

By Mr. Skinker: Now, Your Honor, in view of the testimony, I want once more to renew the motion that the testimony as to the hearsay, what he heard somebody say, be stricken out. It is too far removed from the accident, and not by anyone who saw it or purported to see it.

[fol. 255] By Mr. Gentry: I make the same objection, the same motion on behalf of my client.

By the Court: Motion denied, both motions.

To which ruling of the Court the Defendants, and each of them, by Counsel, then and there duly excepted at the time and still continue to except.

Redirect examination.

By Mr. Edwards:

Q. Mr. Drashman, you said on direct examination that this statement about this thing sticking out from the train hitting Haney was made by an Illinois Central switchman, don't you remember telling me that?

A. I suppose it was a switchman, I don't know who it was.

Q. I asked you if that switchman was a Frisco switchman, and you said no, he was an I. C. switchman?

A. Probably I did, but there was no Frisco switchman around there at that time.

Q. What made you say that the man who made that statement was a railroad switchman?

A. Because there was a gang of switchmen around him when I got there.

Q. Did the man have a lantern—did he indicate he was a switchman?

A. They all had lanterns. I had my flashlight.

Q. You said a moment ago that the man who made the statement that something sticking out from the train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that?

A. Yes, sir.

Q. That is true, isn't it?

A. I think so, no one else was around there but I. C. men at the time.

Q. But Mr. Gentry just asked you, you don't know the man's name, but you knew he was an I. C. switchman.

A. I know he was a switchman, yes, sir.

Q. A railroad switchman?

A. Yes, sir.

Q. There in the yards?

A. Yes, sir.

[fol. 256] Q. And it was made there at the switch?

A. I didn't say "at the switch." I said in that location.

Q. Well, there was several people there when that statement was made to you?

A. Yes, sir.

Q. And that was the one time you went down there?

A. Yes, sir.

Q. Now, this mail hook, or what do you call it—the pouch hook?

A. Mail pouch hook.

Q. When that hook is set out like this (indicating), from the side of the train, it extends out about three feet, doesn't it—you say now it extends out about twenty-six inches?

A. Do you mean when it is raised up?

Q. This brace Mr. Skinker just asked you about, you say that extends out about twenty-six inches?

A. No, sir; I said when you raise the hook preparatory to catching a pouch.

Q. That is what I mean.

— But they don't have to do it around there.

Q. But if that mail pouch hook was extending out that way, it would be extending out about twenty-six inches from the side of the train, as you now say?

A. If it was raised up, but they would have to open the door to do that, you see.

Q. Now, when the trains back in, did you ever see them back into the station on occasions like this—did you ever see the passenger trains backing in?

A. I have been watching them back in there off and on for forty years.

Q. Long trains like this, you have seen back in?

A. Yes, sir.

Q. Now, when those train are backing in, tell the Jury if those side doors on the express cars and mail cars are open or shut.

A. They are shut.

Q. Never saw one open?

A. I have seen them open after they backed into the depot.

Q. You never saw one open as they backed into the depot?

A. No, sir.

[fol. 257] Q. Never did in your whole forty years?

A. When a man is working in there he is supposed to keep those doors closed.

Q. Never saw one open in your whole forty years as it backed in, have you?

A. You mean, backed into the depot?

Q. Sure.

A. After they leave the main track and got on the line where I was, they opened them.

Q. I say, you never in your forty years saw one open as it backed in?

A. I refuse to answer that. I have already answered that.

Q. All right, if you refuse to answer.

Q. You are just trying to——

By Mr. Edwards: (Interrupting) All right, all right. Now, Mr. Drashman, could you have been mistaken about having been down at this Frisco switch where Haney was injured fifteen minutes, that you were down there three minutes and not down there fifteen minutes—but about three minutes, could you be mistaken on that?

A. Well, I was there longer than any three minutes.

Q. How is that?

A. I was there longer than any three minutes, because Mr. Young and I walked around the place there, and stepped off the distance from the switch to the spot. And I talked to some of their city detectives there for a while.

Q. And you claim when you were down there, that Haney's body was not there?

A. Yes, sir; I do claim that.

Q. Let me read from your deposition, page 192, do you remember these questions being asked you, and these being your answers in the deposition, speaking of what struck Haney: "Q. Could that have been with a round pipe? A. Well, it could have been, yes. Q. Did you see Haney's face? A. No. Q. Was he ever turned over so you could look at his face? A. Not while I was there. Q. How long did you remain there? A. Well, I imagine about three minutes. Q. [fol. 258] And then did you ever return to the place? A. Yes, after the body was moved." Do you recall testifying to what I have read, the answers to questions I have read here?

A. No, sir.

Q. Is what I have read to you true?

A. No.

Q. It is not true?

A. No.

By Mr. Edwards: I offer that in evidence.

By the Witness: As I told you, I never did see the body.

By Mr. Edwards: I offer that in evidence as part of the cross-examination. I offer, Your Honor please, in order that there be no mistake, what we have read. His deposition as on file in this Court, so that any parts of it may be used by anybody that wants to use it. There has been quite a bit of reading from this deposition in the pages given, and I offer the entire deposition in evidence, so that it will be available to anybody.

By Mr. Skinker: We have heretofore offered our objections to that, Your Honor. We renew them. There is no reason for that deposition to be introduced in evidence.

By Mr. Edwards: I understood there is no objection on your part.

By Mr. Gentry: Yes, I think I had better object to it, in view of what Mr. Skinker just said, because of the objectionable things we have pointed out heretofore, particularly.

By the Court: Very well, the same ruling, it may be admitted.

To which ruling of the Court, the Defendants, and each of them, by Counsel, then and there duly excepted at the time, and still continue to except.

Said deposition is as follows:

(Clerk will here insert deposition of witness John J. Drashman.)

Said deposition is hereinafter set out at pages 75-87.

[fol. 259] Cross-examination (Resumed).

By Mr. Gentry:

Q. Just one question. Mr. Drashman, you spoke of that switchman down there, that was talking down there at the scene of the accident, and you were asked if he was a Frisco switchman, and you said no. I believe you say you thought he was an Illinois Central switchman. Now, as a matter of fact, you did not make any investigation or any effort to find out whether that man was working for the Illinois

Central or for the Yazoo-Mississippi Valley Railroad, did you?

A. No, sir.

Q. And you do not know now what railroad company that man was working for, do you?

A. I do not, no, sir.

By Mr. Gentry: That is all.

Redirect examination.

By Mr. Edwards:

Q. You do know though from his appearance that he was a railroad switchman, don't you?

A. Yes, sir; that is right.

Q. You have had the experience of seeing railroad switchmen there in the yards for about forty years, haven't you?

A. That is right.

Q. And this man was dressed, and had all of the appearances of a railroad switchman, that made this statement to you here, wasn't he?

A. That is right.

Q. You saw blood there near the switch, the Frisco switch, where Haney was hurt, did you not?

A. No, sir.

Q. Don't you remember so testifying that you saw blood there?

A. I saw the blood on the mound, not near the switch.

Q. How near the switch?

A. Oh, about fifteen feet.

Q. Don't you remember testifying this blood, that you saw this blood within about six feet of the tracks?

A. No, sir; I do not.

Q. I will ask you, on page 193, if you do not recall testifying to that in your deposition, starting at the bottom [fol. 260] of page 192: "Q. Oh, after they moved the body. Did you see any blood around there where—close there? A. Yes, there was a spot of blood about six inches across. Q. About what? A. About six inches across." Do you remember testifying to that?

A. No, sir; I do not; I didn't measure it.

Q. Is that true?

A. That is your statement, I don't know anything about it.

Q. I mean, did you testify to what I have read?

A. I did not.

Q. And it is not true?

A. No, sir;

Q. The next question: "Q. And about how far was that blood from the Frisco tracks? A. Well, I didn't measure it, but I should judge about six feet, something like that.

Q. About six feet, something like that? A. Yes." Do you remember so testifying?

A. Yes, sir.

Q. That is true, isn't it?

A. That is, yes, sir.

Q. Well, why did you just get through saying that you did not say that?

A. That is not the question you asked me, but that is a different question, a different answer altogether.

Q. All right, (Reading) "Q. And that, you mean six feet north of the north track of the Frisco tracks? A. I mean south of that track there where the Frisco backs in on." Did you testify to that?

A. No, sir; that is the north side, that is what I told you.

Q. Then you testified it was both south and north, didn't you?

A. No, sir.

Q. Well, what do you say now, did you see blood there?

A. I did.

Q. All right, did you see blood there north or south of the Frisco track?

A. North of the Frisco track.

Q. Well, a minute ago, you say you saw blood on the mound.

A. That is right, that mound is north of the Frisco track. [fol. 261] Q. There is no mound south of the Frisco track, is there?

A. No, sir.

Q. Then, if you saw a mound it was north of the Frisco tracks, wasn't it?

A. That is right.

Q. Then, did you testify as I read to you, that you saw this blood south of the tracks, too?

A. No, sir.

Q. Well, in order to get it clear, I will read that again, that last one: "Q. And that, you mean six feet north of the north track, of the Frisco tracks? A. I mean south of that track there where the Frisco backs in on." Do you remember testifying to that?

A. You have the wrong wording, if I testified to you that way. I told you that the blood was north of the Frisco tracks and south of the wye where they back into the depot.

Q. Well, did you testify to what I just read?

A. No, sir.

Q. Now the next question: "Q. The Frisco track there runs generally east and west, at the switch, I mean? A. Yes." You testified to that, didn't you?

A. Yes, sir.

Q. "Q. Now, which way from this switch did you notice this blood, east or west of this switch? A. It was south, south of the rail, I don't know how close to the switch." Did you so testify?

A. No.

Q. "Q. South of the rail? You mean north of the rail? A. I mean south, going south, on the south side of the railroad track, backing to the station—the track runs east and west. Q. That is right. A. This is on the south side of the track." Do you remember so testifying?

A. I do not.

Q. Is that true, what I have read to you, is that true?

A. What?

Q. What I have just read.

A. (No Response.)

Q. Well, further: "Q. That you saw blood? A. Yes, sir. Q. How close was that blood to his body? A. That was after his body was removed." Did you so testify?

A. Yes.

[fol. 262] Q. Is that true?

A. That is true, I saw it after the body was removed.

Q. Did you see it south of the Frisco tracks, did you see blood south of the Frisco tracks?

A. I just got through telling you a while ago where it was.

Q. Just answer the question, did you see it south of the Frisco tracks?

A. No.

Q. Then what I have read about it being south of the tracks, is not true, is it?

A. No.

Q. You say you only went there once?

A. Yes, sir.

Q. You did not go twice?

A. No, sir.

Q. Now, on page 194, do you recall about that: "Q. When did you return there after the body was removed? The next day? A. No, the same night. Q. That night. Did anybody return with you? A. Yes. Q. Who was that? A. Mr. Young and I were down there together. Q. Mr. who? A. Young. Q. Did Mr. Young go there with you the first time? A. Yes, sir." Do you remember so testifying?

A. No, sir; I told you we went down there together one time, that is all.

Q. And the next question: "Q. And also the second time? A. Yes." Did you so testify?

A. I did not.

Q. Is that true?

A. No.

By Mr. Edwards: All right, I think that is all.

By Mr. Skinker: That is all.

(Witness excused.)

Deposition of John Joseph Drashman given in this case on May 1, 1941, before Lee Winchester, a notary public at Memphis, Tennessee, is in words and figures as follows, to wit:

[fol. 263] JOHN JOSEPH DRASHMAN, of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says on the part of the plaintiff as follows:

Direct examination.

By Mr. Edwards:

Q. Give us your name in full?

A. John Joseph Drashman.

Q. What is your business?

A. Frisco Railroad.

Q. Where do you live, Mr. Drashman?

A. 540 East Trigg Avenue, Memphis, Tennessee.

Q. And you are employed by the Frisco Railroad?

A. Yes, sir.

Q. What do you do for them?

A. Coach foreman.

Q. Coach foreman?

A. Yes, sir; foreman of passenger equipment.

Q. And what are your duties as such foreman?

A. Supervise cleaning and repairs of all passenger equipment.

Q. And you occupied that position in December, 1939?

A. Yes, sir.

Q. Did you know Lyman Haney?

A. I believe I did.

Q. You were not well acquainted with him, I suppose?

A. No.

Q. Did you know where he worked as a switch tender?

A. Yes, sir.

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Q. Were you in the vicinity of where he was injured on December 21, 1939?

A. I went down there right after I heard that there was an accident there.

Q. And where were you when you heard there was an accident?

A. Up around the Stationmaster's office.

Q. What did you find when you got down there and where did you go?

A. Well, I went down to the switch tender's shanty there.

[fol. 264] Q. You went to Haney's switch tender's shanty?

A. Yes.

Q. And did you go to a switch near by, where his body was?

A. Well, I don't think his body was by any switch, it was between the switch stand and—

Q. Well, did you see Haney's body down there?

A. Yes.

Q. And how far was it from the Frisco switch, from the main line?

A. I don't know, I didn't measure it.

Q. Well, how far was it from the Frisco tracks?

A. I did not measure that.

Q. What would be your best judgment?

A. About six feet.

Q. About six feet. Do you refer to the body or the head or what part of Haney's body would you refer to?

A. Well, I think the whole body.

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Q. The whole body. And which way was Haney's head pointing when you first saw it?

A. I believe it was west.

Q. Pointed west. And was he lying on his back or on his face or side or how?

A. On his face, if I remember right.

Q. Lying on his face?

A. Yes.

Q. With his back up?

A. Yes.

Q. And you think his head was faced west?

A. Yes.

Q. Are you sure about that?

A. No, I am not sure. I think it was.

Q. Well, I just want to know if you are reasonably sure.

A. No, I am not sure, because I didn't pay that much attention to it.

Q. He might have faced east then?

A. Yes, could have been.

Q. I see. Who was there when you arrived where you found Mr. Haney, as you say?

A. Well, Mr. Young and I went down together, our superintendent of terminals.

[fol. 265] Q. And who was there when you arrived there?

A. Well, I don't know; there were several parties there, and I think this I. C. switch engine foreman, Brusco, he was there, and I think there were several of the City plain clothes men were there.

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Q. These men were there when you got there that you are speaking of?

A. Yes.

Q. You think there were several men there?

A. Yes.

Q. Did you notice anything about Haney's head or body that indicated he had been injured?

A. Well, I saw what looked to me like a hole knocked in the back of his head, like someone had struck him with a blunt instrument of some kind.

Q. What kind of a wound was that on the back of Haney's head?

A. Well, it looked like a caved-in place, it wasn't exactly a cut place, it looked like someone had hit him with a club or something.

Q. Could that have been made with a round pipe?

A. Well, it could have been, yes.

Q. Did you see Haney's face?

A. No.

Q. Was he ever turned over so you could look at his face?

A. Not while I was there.

Q. How long did you remain there?

A. Well, I imagine about three minutes.

Q. And then did you ever return to the place?

A. Yes, after the body was moved.

Q. Oh, after they moved the body. Did you see any blood around there where—close there?

A. Yes, there was a spot of blood about six inches across.

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Q. About what?

A. About six inches across.

Q. And about how far was that blood from the Frisco [fol. 266] tracks?

A. Well, I didn't measure it, but I should judge about six feet, something like that.

Q. About six feet something like that?

A. Yes.

Q. And that, you mean six feet north of the north track, of the Frisco tracks?

A. I mean south of that track there where the Frisco backs in on.

Q. The Frisco track there runs generally east and west at the switch, I mean?

A. Yes.

Q. Now, which way from this switch did you notice this blood, east or west of the switch?

A. It was south, south of the rail, I don't know how close to the switch.

Q. South of the rail? You mean north of the rail?

A. I mean south, going south, on the south side of the railroad track, backing to the station—the track runs east and west.

Q. That is right.

A. This is on the south side of the track.

Q. That you saw blood?

A. Yes, sir.

Q. How close was that blood to his body?

A. That was after his body was removed.

Q. How is that?

A. That was after his body was removed that I saw the

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blood.

Q. Did you see any blood there while the body was there?

A. No.

Q. You didn't?

A. No, not except on his head there.

Q. When did you return there after the body was removed? The next day?

A. No, the same night.

Q. That night. Did anybody return with you?

A. Yes.

Q. Who was that?

A. Mr. Young and I were down there together.

Q. Mr. who?

A. Young.

Q. Did Mr. Young go there with you the first time?

A. Yes, sir.

Q. And also the second time?

A. Yes.

Q. Was anybody else there with you the second time?

[fol. 267] A. There were three of those, I think plain clothes men, City detectives.

Q. Do you know who they were?

A. No, I don't know who they were.

Q. Did you measure this distance from where the blood was?

A. No.

Q. Is there a mound north of the Frisco tracks there at the switch?

A. Well, there may be what you call a mound; there is a pile of dirt piled up there.

Q. And where is this pile of dirt with reference to the

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switch, which way from it?

A. I don't know.

Q. Is it north or south?

A. I don't know, I don't know just where that switch is, I didn't pay any attention to it.

Q. Do you know how high that mound of dirt is?

A. Well, I imagine about two feet above the rail.

Q. About two feet above the rail. And about how long does that extend along there?

A. Oh, several feet.

Q. Does it extend east and west of the switch?

A. Both east and west of the tracks, yes.

Q. What do you have to do with the Frisco equipment?

A. I supervise repairs and cleaning of it.

Q. Do you supervise repairs of trains such as this Frisco Train No. 106?

A. Yes.

Q. Did you examine Train No. 106 after Haney was found?

A. Yes, sir.

Q. Where did you examine it?

A. In the station after it was backed in under the shed.

Q. In the station?

A. Yes, sir.

Q. Was that after you heard Haney was killed or hurt?

A. After I was down to the scene of the accident I went back.

Q. You mean after you had gone down and seen Haney?

A. Yes, sir.

Q. And you came back?

A. Yes.

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[fol. 268] Q. Then you examined the Frisco train?

A. Yes.

Q. Did you do that personally or have some assistance?

A. I did that personally.

Q. What examination did you make?

A. To see if there was anything protruding on the side of the train, any grabholds, any handles or anything outside of the cars.

Q. How long was that train, that Frisco train, how long was it?

A. I believe it was nine cars.

Q. Do you know what those cars consisted of, what kinds?

A. Yes.

Q. What kind were they?

A. They had a combination mail and baggage, two baggage cars, two coaches, diner and two sleepers, Pullman cars they call them—

Q. How many mail cars?

A. One mail car, combination mail and baggage.

Q. Did you look all along that train?

A. Yes, sir.

Q. What did you find?

A. Nothing.

Q. Why did you look along that train?

A. That is customary if we have a report of any kind of an accident, whether we are involved or not, to make an inspection.

Q. You made an inspection, I believe, you just told me, after you had seen Haney's body where he was injured up there?

A. Yes.

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Q. Now, had you a custom of examining this train otherwise whether you had any report of any accident?

A. No—we have an inspector that does that kind of work.

Q. But you made a special examination on this occasion?

A. Yes, sir.

Q. And you found nothing wrong?

A. That is right.

Q. Did you find this mail coach, on this mail coach, did it have any mail hook on it?

A. Yes, one on each side of the car.

Q. One on each side. What kind of a hook is that, can you describe that?

A. Yes, it is iron, V-shaped.

[fol. 269] Q. And how does that work?

A. One side of it is fastened through brackets on each side of the door posts, and the other hangs down against the side of the car, with a handle on top.

Q. Can that be extended out to the side of the train?

A. Yes.

Q. How far out to the side of the train can that mail hook be extended?

A. You can swing it out three feet.

Q. Swing out three feet?

A. To the tip end of the hook.

Q. I believe these trains have a hang-over of about two feet and a half, I believe it was stated here—did you say

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two feet and a half, Mr. Skinker?

Mr. Skinker: He would know about that.

Mr. Edwards: Well, you said two feet and a half.

A. Hang-over how?

By Mr. Edwards:

Q. From the side of the rail, these passenger trains, such as this No. 106, extend out about two and a half feet from the side of the rail, is that right?

A. No.

Q. How is that?

A. No.

Q. Well, how far do they extend outside of the rail?

A. What do you mean, the body or journal box or what?

Q. The body of the train, the coaches?

A. The body of the train, not over fourteen inches.

Q. Fourteen inches?

A. Yes.

Q. Does any other part of the train extend out any farther to the side?

A. No.

Q. How is that?

A. No, sir.

Q. It don't?

A. No, sir.

Q. Well, you spoke of examining this train, did you examine the right side, the engineer's side?

A. Yes, I went around both sides, but particularly on the engineer's—on the—it was on the fireman's side.

[fol. 270] Q. Oh, you particularly examined the fireman's side?

A. Yes.

Q. Now, what do you mean particularly examined the fireman's side—did you examine that better than you did

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the engineer's side?

A. I looked at that very close.

Q. You examined the fireman's side very close?

A. Yes.

Q. And you didn't examine the engineer's side quite so close?

A. Not so close, no.

Q. Why was that difference?

A. Well, because someone said that they thought that train No. 106 backing into Grand Central Station is what struck this man.

Q. You mean Haney?

A. Yes.

Q. That is, someone told you that at the scene of the accident?

A. No, he didn't see the accident, I heard someone say that is what happened.

Mr. Skinker: Just a moment. We object to that and ask it be stricken out as purely hearsay.

A. That is all—I didn't get who it was.

By Mr. Edwards:

Q. All right, who told you that, and when?

A. I don't know who it was, I just heard them talking around there.

Q. Who did you hear talk and where?

A. I don't know who it was, down where Haney's body was laying on the ground.

Q. Where Haney's body was laying on the ground?

A. Yes.

Q. That is where you heard this statement made?

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A. Yes, sir.

Q. Somebody said they thought something sticking out on the train hit him, is that right?

A. That is what I heard there.

Q. That is what you heard there?

[fol. 271] Mr. Skinker: Just a moment; I want to object to that as hearsay and improper and may it go to all similar questions?

Mr. Edwards: Yes.

By Mr. Edwards:

Q. That was down there when you first went down and saw Haney's body?

A. Yes.

Q. You heard someone there, where the body was, saying that they thought something sticking out on the train hit him, is that right?

A. That is right.

Q. When you heard that you went back and examined the train?

A. That is right.

Q. Now, is it possible this mail hook could have hit him?

A. No.

Q. Why not?

A. Because the body was too far from the rail.

Q. You mean too far out, north of the rail?

A. Yes; and it is above the average height of a man's head.

Q. Well, this place where the train backed in, the north side of the rail would be lower than the south, wouldn't it?

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A. Well, I don't know that it would.

Q. Wouldn't that train backing in like that lean a little to the north?

A. Well, no, I don't think that there is that much elevation there to cause the equipment to lean.

Q. Would you say the train wouldn't lean any to the north?

A. No.

Q. I say you say it wouldn't?

A. I say it would not.

Q. Are these mail hooks, you talked about here, all the same height?

A. They are all standard.

Q. Don't they ever get bent?

A. Very seldom.

Q. They do sometimes, don't they?

A. Oh, yes.

Q. Sometimes they swing out from the side of the train, don't they?

A. No, the weight holds them against the side of the car.

[fol. 272] Q. Sometimes they tie them to the side of the train, don't they?

A. Tie them?

Q. Tie them to the side of the train?

A. No, you can't tie them, the mail clerk has got to use them.

Q. When were you in the Frisco yards last?

A. About 12:15 today.

Q. Were you down there last night?

A. I was down at Grand Central Station last night.

Q. Haven't you got one tied down there right now?

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A. Not that I know of.

Q. Tied to the side of the car with a string, a heavy string?

A. No, not on the Frisco—if there is I haven't seen it.

Q. You have seen them that way, haven't you?

A. No.

Q. Do the switch tenders, such as Haney, have any duties to perform under your supervision?

A. No, sir.

Q. You have nothing to do with switch tenders?

A. No, sir.

Q. Do you know how the switch tenders work?

A. No.

Q. Do you know anything about their duties?

A. Not a thing.

Q. Did you ever see Haney after that first time that you told us about going there to this Frisco track?

A. No.

Q. How is that?

A. No, sir.

Q. Do you know how soon they removed Haney's body after you and Mr. Young first went to the scene where he was found?

A. No, I do not.

Q. Did this Frisco train that you have described, No. 106, have any baggage coaches on it?

A. Yes.

Q. How many, did it have?

A. Two.

Q. Do you know what they were carrying at that time?

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[fol. 273] A. Various commodities shipped by express companies.

Q. They were pretty heavily loaded, weren't they?

A. I imagine they were, I don't know.

Q. Just before Christmas—did you say you imagine they were?

A. I imagine they were, yes.

Q. That train was longer than usual, wasn't it, that Frisco train?

A. Well, I don't think so.

Q. You don't think so?

A. No.

Q. I mean on account of it being just before Christmas, do you think that caused them to haul more and have more coaches on that train?

A. No.

Q. You don't think it did?

A. No.

Q. You think the number of coaches was about what they usually have?

A. As a rule they do, yes.

Mr. Edwards: You can take the witness.

Cross-examination.

By Mr. Skinker:

Q. What did you call that lever in the mail car that you have been talking about, what is the name of it?

A. Mail pouch catcher.

Q. Mail pouch catcher?

A. Yes.

Q. That is the metal rod that is V-shaped?

A. Yes.

Q. And used to pick up packages, usually of mail, while the train is in motion, isn't it?

A. Yes, while the train is in motion; the agent hangs

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the mail on a hook and while the train is in motion the mail clerk swings that handle out that way and that catches the sack in the V-shape there.

Q. Now, is there any way to move that pouch handle, I believe you call it, is there any way to move that pouch handle except as the U. S. mailman in the car moves it?

A. No.

[fol. 274] Q. He moves it from inside the car?

A. From in the doorway.

Q. In other words, he presses down on the handle on the inside of the car?

A. Yes.

Q. And that brings the pouch catcher up on the outside?

A. That is right.

Q. How high is that pouch catcher above the rail?

A. About eight feet.

Q. About eight feet?

A. Yes, sir.

Q. That is above the head of a man, of course?

A. Oh, yes.

Q. Did you know Mr. Haney in his lifetime?

Mr. Edwards: He said he didn't.

A. I believe I did, I think he was a man just about my height.

By Mr. Skinker:

Q. And how tall are you?

A. Five feet six.

Q. Now, as I understand you, Mr. Drashman, as I understand you, you examined this entire train from the front

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to the back?

A. Yes, sir.

Q. And on both sides

A. Yes, sir.

Q. And you found nothing out of kilter or nothing irregular?

A. No.

Q. On any part of the train?

A. No.

Q. Is there any kind of rod or pipe or mail pouch catcher or anything of that kind extending out from the side of the train on either side?

A. No. The handholds, they extend out—

Q. (Interrupting) I mean on this occasion, extending out beyond their normal fixed place?

A. Oh, no, nothing, not a thing, there was nothing out of line whatever.

Q. Everything was in its regular normal place?

A. Yes, sir, everything.

Mr. Skinker: I believe that is all.

[fol. 275] Further direct examination.

By Mr. Edwards:

Q. Isn't it a fact, Mr. Drashman, you can go along and raise these mail hooks up on the side of the train?

A. No, you can't raise them.

Q. You can't?

A. No.

Q. I raised about six of them up last night.

A. Probably you can, you are a little taller than the average man—but how high could you raise them?

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Q. Oh, raise them up, taking them all, they are not fastened, they are not fastened down, are they?

A. No.

Q. These mail hooks are not fastened down, are they?

A. No, sir.

Q. To the side of the train, are they?

A. No, sir, not on the bottom.

Q. Last night I didn't find any—you can just take and raise them up.

A. Where were you?

Q. Over in the Grand Central?

A. Over in the Grand Central Station?

Q. That is right.

A. The platform is about six inches above the rail.

Q. There was about six or seven cars in there and there wasn't any you couldn't raise up, because I did that last night.

A. You can raise them up, but they will not swing out with the motion of the car.

Q. What is that?

A. They will not swing out with the motion of the car.

Q. They will not swing out with the motion of the car—but I say, they are not fastened down?

A. They are not, no.

Q. That is what I want to get at, these mail hooks are not fastened down.

A. No.

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[fol. 276] Appellants have reduced the testimony of Dr. W. E. Turner, Jr., in their joint abstract of the record so much so that it does not express and convey its full meaning and effect and respondent therefore believes that in order to fairly and fully present the testimony of Dr. W. E. Turner that it will be necessary to print the same in full taken from the Bill of Exceptions, pages 205 to 225, inclusive.

The deposition of Dr. W. E. Turner, Jr., taken by the respondent on December 16, 1941, at the Army Dispensary 1, Engineer Replacement Training Camp, Group 6, Fort Leonard Wood, in Pulaski County, State of Missouri, before Notary Public Rufus L. Robertson, is as follows, to-wit:

Appearances:

N. Murry Edwards, Esq., for the plaintiff.

C. H. Skinker, Jr., Esq., by Walter Studt, Esq., for the defendants.

It was stipulated and agreed by and between counsel for plaintiff and counsel for defendants, that this deposition may be taken in shorthand by Joseph Feldman, a

shorthand reporter of the City of St. Louis, and afterwards transcribed into typewriting and the signature of the witness waived.

W. E. TURNER, JR., of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says in behalf of the plaintiff as follows:

Direct examination.

By Mr. Edwards:

Q. Will you give us your name in full?

A. Wiley E. Turner, Jr.

[fol. 277] Q. Where do you live, Doctor?

A. My office, is that what you mean?

Q. Yes.

A. Piggott, Arkansas.

Q. And you are now stationed in the United States Army?

A. Yes, sir.

Q. A lieutenant in the medical corps here at Camp Fort Leonard Wood?

A. Yes, sir.

Q. Will you tell us from what medical school you are a graduate?

A. University of Tennessee.

Q. And when did you graduate from the University of Tennessee Medical School?

A. That was in March, 1939.

Q. You got your M. D. in March, 1939?

A. Yes.

Q. And what did you do in the line of practicing your profession as a doctor after you finished medical school?

A. I went into general practice in surgery—a general practitioner, you better put it.

[Page 2]

Q. Your father, I believe, is a doctor?

A. Yes.

Q. And were you connected, after your graduation from medical school, with some hospital at Memphis, Tennessee?

A. Yes, sir, the St. Joseph's.

Q. The St. Joseph's Hospital in Memphis, Tennessee?

A. Yes, sir.

Q. And where is that hospital located?

A. It is—what is the date of this thing—I am thinking of whether or not I was a junior interne or a senior interne—

Q. This date is December 21, 1939?

A. It is on Jackson—the number of that on Jackson—

Q. St. Joseph's Hospital is on Jackson street, in Memphis, Tennessee?

A. Yes, either 186 or 286, I believe.

Q. What were your duties down at the St. Joseph's Hospital at Memphis, Tennessee?

A. I was an interne.

Q. And you were an interne there in December, 1939?

A. Yes, sir.

[fol. 278] Q. What were your duties there—what did you do and what did you have to take care of?

A. It was a rotating internship.

Q. Were you on a receiving ward or department of that hospital for awhile?

A. Yes, sir.

Q. And you were on the receiving ward, were you, in December, 1939?

A. Yes, sir.

[Page 3]

Q. Now, that hospital, St. Joseph's Hospital is a regular hospital conducted as other hospitals, I believe, isn't it?

A. Yes.

Q. Quite a large hospital, is it, Doctor?

A. Yes, sir; it is, I would say the average size for a city.

Q. And that hospital keeps records like other hospitals?

A. Yes, sir.

Q. You are familiar with hospitals, I suppose, in other states besides Tennessee—Missouri and other states—Missouri and Arkansas?

A. Yes, sir.

Q. And was the hospital, the St. Joseph's Hospital at Memphis, Tennessee, conducted in the same manner in which hospitals in Arkansas and Missouri were conducted?

A. Yes.

Q. And did they keep records in the same manner in which they do in Arkansas and Missouri?

A. Yes, sir.

Q. And Tennessee?

A. Yes, sir, as far as I know, they do, yes.

Q. Now, just how long were you at St. Joseph's Hospital, Doctor, do you recall?

A. Let's see, the exact dates, let me see—I was there about fourteen months, I think, as a senior interne, I was there eighteen months as a junior before I started the senior internship.

[Page 4]

[fol. 279] Q. And after leaving St. Joseph's Hospital at Memphis, you went to Piggott, Arkansas, with your father, I believe?

A. Yes.

Q. You and your father opened some kind of a small clinic or hospital, did you not?

A. Yes.

Q. And how long did you serve there with your father at Piggott, Arkansas?

A. I was there from April until, let's see, April, 1940, until June 10, 1941.

Q. April, 1940, until June 10, 1941, this year?

A. Yes, sir.

Q. And you and your father conducted this hospital—what did you call that hospital there?

A. The Turner Clinic.

Q. Turner Clinic?

A. Yes, sir.

Q. And you had a great number of patients?

A. Yes.

Q. I believe I visited you there last spring?

A. We had plenty of work—yes, sir.

Q. And you had an average of about how many patients a day at that clinic at Piggott, Arkansas?

A. We run around, I guess around an average of forty patients.

Q. Forty patients a day at the clinic at Piggott, Arkansas?

A. Yes, sir.

Q. This clinic at Piggott, Arkansas, your father still conducts that?

A. Yes, sir.

[Page 5]

Q. Going back to your services at this St. Joseph's Hospital at Memphis, Tennessee, I will show you a paper which is a photostat copy of the record of Lyman T. Haney, taken to the St. Joseph's Hospital at Memphis, Tennessee, December 21, 1939, and ask you if you identify that as being a regular record of the St. Joseph's Hospital kept in the regular operation of their business?

A. (After examining) Yes, sir.

Q. It is?

A. It is; yes, sir.

[fol. 280] Mr. Edwards: I will let this record be marked Plaintiff's Exhibit 1 to this deposition. Let the reporter mark it.

(The reporter marked said photostat copy of hospital records as Plaintiff's Exhibit 1, J. F. 12/16/41.)

Q. Now, Plaintiff's Exhibit 1 consists of six photostat copies of six pages of the hospital records dated December 21, 1939, of Lyman Haney. Now, Doctor, will you take Plaintiff's Exhibit 1, being the hospital record I have described, of Lyman Haney, dated December 21, 1939, and tell us what you had to do with Lyman Haney and what examination you made and what you found?

A. Well, the main thing that I had to do was to decide that he was dead, because he was dead, and I just pronounced him dead. Of course, I went over his body externally, and then we carried him on to the morgue and I assisted in the autopsy.

[Page 6]

Q. Assisted in the autopsy?

A. Yes.

Q. Then you made up this record here, Plaintiff's Exhibit 1 that you are looking at, the hospital record of St. Joseph's Hospital?

A. Yes, I made this out (indicating).

Q. Now, the first page of the hospital record of the St. Joseph's Hospital of Lyman Haney, is made out in your handwriting in longhand, is it, Doctor?

A. Yes, sir.

Q. Will you read into the record what you found Lyman Haney died of, and why you found it?

A. He died of a fractured skull and he had a subdural hemorrhage—do you want me to read all of this?

Q. Go ahead, read what you found. You can refresh your memory, Doctor, by looking at that record, and read what you found?

A. Well, don't write all this down—this is what we found, the whole thing right here.

(Then followed a short discussion off the record.)

[fol. 281] Mr. Edwards: Go ahead and just tell, from an examination of Lyman Haney, what you found?

A. Well, we found the deceased was a white male, it was the body of a well developed, under average size male, of about fifty years. He had an abrasion of the right posterior part of his head—

Q. That is the back of his head you mean?

A. Yes.

[Page 7]

Q. Go ahead.

A. Approximately five centimeters long and one centimeter wide with a depression of the skull under the abrasion involving occipital and parietal regions.

The right side of the face was covered with wet, dirty cinders ground into the face, and the lips were bruised and cinders and blood were on his lips. He had artificial teeth. And the rest of his body was free of abrasions, lacerations, or bruises.

The extremities were freely movable—mobile. Rigor mortis had not set in—it was absent. I can't remember all that but as I read it I know that is the way it was, and I know this is an exact record and I can tell. This other is given in the autopsy here—just a minute—and I don't know that there would be any use in saying this or that—
 } we found this at the autopsy, not in the examination—I can give all of that, all right, if you want me to.

Q. No, just give the skull part.

Mr. Studt: Wasn't the whole part of that, part of your autopsy, all your findings, too?

Mr. Edwards: Here is what it is—this is probably repetition of what he has already given.

A. Here, this, as to his lungs, you see, we start at the head and you might say go over everything; it was a com-

plete autopsy, the lungs, heart, liver, spleen, intestines, urinary bladder, skull, and all that.

[Page 8]

[fol. 282] Q. You assisted in the autopsy, and all those findings in the hospital record are what you found?

A. Yes.

Q. And of the skull, principally, we are interested in—I understand he died of a—

A. This is the cause of his death (indicating).

Q. The skull injury killed him?

A. Yes, and the hemorrhage from the skull injury.

Q. And the hemorrhage from the skull injury?

A. Yes, sir.

Q. At the bottom of the report, Doctor, as to the skull, what did you find about the injury to the skull?

A. There was an extravasation of blood into the scalp, temporal and occipital muscles adjacent to the above described abrasion of the head. There was a fracture of the calvarium radiating downward from the abrasion to left and right involving right parietal occipital, right and left temporal and sphenoid bones. The accompanying hemorrhage covered the cerebrum and cerebellum. The brain substance was not grossly lacerated. The spinal fluid was clear.

Now, the diagnosis after our autopsy—

Q. Go ahead.

A. Was traumatic fracture of skull with associated meningeal hemorrhage.

Cause of death was due to the fracture of the skull following blow applied to the head posteriorly perhaps by a piece of iron pipe, a small fast moving object, round object, probably.

[Page 9]

Q. Now, will you go back, Doctor, to the first page of this exhibit, of the hospital record and tell us what the finding was there—that is your handwriting?

A. Yes, right here.

Q. Go ahead, tell us about that?

A. It says "Where and How accident occurred."

[fol. 283] Q. Yes.

A. Railroad yard, cause undetermined, fractured skull by fast moving small round object. That is, just as our

experience shows, we know that certain types of objects cause certain types of fractures.

Q. That was your conclusion that this injury to the back of the head was caused by a——

A. Small round fast moving object.

Q. Small round fast moving object?

A. Yes.

Q. Now, in your opinion could that small round fast moving object be a rod or something projecting out from a train that was going eight or ten miles an hour?

Mr. Studt: I object to that question on the ground a groundwork has not been laid, and what the doctor perhaps knows about the construction or equipment of a train is improper——

Mr. Edwards: I am just assuming that will be part of the evidence and the proof later. I am asking the doctor if what he found, by a small round fast moving object, if that would be an object or could it be an object on a train backing eight or ten miles an hour.

[Page 10]

A. I guess it would be possible, as far as I know about it, I don't know anything about it but I think it could be.

Q. And why do you find, Doctor—why did you find that this injury to the back of the deceased Haney's head was caused by a small round fast moving object? What indicated that to you?

A. Well, probably it was a little fresher in my memory then than it is now, but a large blunt object causes a certain type of fracture and a small short object, like a bullet, or something like that, fast moving, pointed object, causes another type of fracture, a penetrating type of fracture, and a round iron pipe or something like that would cause [fol. 284] another type of fracture. In other words, it looked like it was something that was spread out more, you know, on his skull.

Q. And you concluded, after examining Haney, and from the autopsy, that this injury to the back of his head was caused by a round fast moving object?

A. Yes, sir.

Q. Maybe an iron pipe?

A. Sure, yes, sir.

Q. And that of course was made up from your entire examination of Lyman Haney's body?

A. Yes, sir.

Q. And the autopsy?

A. Yes, sir, and it was the opinion of Dr. Kessler—

Mr. Studt: Well, I object to that.

A. And Dr. McIntosh.

[Page 11]

Mr. Studt: I object to that.

Mr. Edwards: I will ask you a question:

Q. Did you also consult with the other doctors assisting in the examination and autopsy of Lyman Haney's body, to come to these conclusions?

A. Yes, I did.

Q. (Continuing:) Written into these hospital records?

A. Yes, sir.

Mr. Studt: I object to that upon the theory it is probably more or less hearsay, anything from the associated doctors that conducted the autopsy with Dr. Turner.

A. That was our opinions; of course, I mentioned my own.

By Mr. Edwards:

Q. All you doctors were together there when you had gone over this case of Lyman Haney?

A. Yes, sir.

Q. And that was the conclusion you had reached and the other doctors had reached after you went over the body of Lyman Haney?

Mr. Studt: We object to that because it calls for a conclusion, the opinions of doctors not present here, and the best evidence would be those doctors themselves. I don't [fol. 285] think Dr. Turner is competent to testify what any other doctor found.

(The last question was read by the reporter.)

Q. That is true, isn't it, Doctor?

A. Yes, sir; that is it.

[Page 12]

Q. You, in your experience in medical school, as well as at the St. Joseph's Hospital, I suppose, had many cases of violent deaths, of bodies brought into the hospital to examine, did you not, Doctor?

A. Yes, sir; we had quite a few.

Q. And in those many cases you came to the conclusion or tried to come to the conclusion as to what caused the death of those various patients and people brought in there?

A. Yes, sir; yes, sir.

Q. I suppose you have had experience, too, you and your father, in the clinic at Piggott, Arkansas, with traumatic injuries and violent deaths there?

A. A few—we didn't have so many there.

Q. You didn't have as many as you had in Memphis?

A. No, sir.

Q. And you concluded, after the examination and autopsy of the body of Lyman Haney, deceased, that he was struck in the back of the head by a round fast moving object?

A. Yes, sir; that is it.

Q. And that round fast moving object could have been a rod or round moving object attached to a backing train going eight to ten miles an hour?

Mr. Studt: Well, I object to that on the theory Mr. Edwards is trying to just assume that it might have been something attached to the train, without any definite proof to that effect.

[Page 13]

[fol. 286] Mr. Edwards: Well, that will have to be proven later.

A. As far as I know, it could be. I couldn't say it was or anything about it.

By Mr. Edwards:

Q. I know you couldn't say it was, you didn't see it, Doctor, you are only testifying as a medical expert?

A. And we didn't have a lot to go by, except what we saw on the body.

Mr. Edwards: Read the question again.

The reporter read the previous question as follows:

"Q. And that round fast moving object could have been a rod or round moving object attached to a backing train going eight or ten miles an hour."

A. Yes, I reckon it could have been.

Mr. Edwards: That is all.

Cross-examination.

By Mr. Studt:

Q. Dr. Turner, this Plaintiff's Exhibit 1 here, that has been presented to you, is this a complete record of the case of this man Haney that you prepared yourself personally?

A. Yes, that on the front you mean.

Q. Just this here?

A. This is mine alone.

Q. Just the first sheet of this exhibit is yours?

A. Yes.

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Mr. Edwards: In his handwriting, as I understand, Mr. Studt.

Mr. Studt: Yes—is in your handwriting and prepared by you?

A. Yes.

Q. Now, this first sheet, the report by you, was made immediately upon the reception of Mr. Haney's body into the hospital, is that it?

A. Yes, sir.

Q. Now, with respect to this autopsy, did you make this autopsy report, too, yourself?

A. You mean did I write it there, or are those my words there?

[fol. 287] Q. Well, yes, did you have anything to do with making this autopsy report, preparing it?

A. I was at the autopsy and took part in the autopsy, but that was dictated to me, I believe, or to Dr. Kessler, by Dr. McIntosh; he was head pathologist on examination there.

Q. In other words, Dr. McIntosh, in effect, prepared and dictated these findings?

A. Yes.

Mr. Edwards: The findings you are referring to, in the hospital record here?

Mr. Studt: In the autopsy, yes.

Mr. Edwards: I mean in the hospital record?

Mr. Studt: Yes, in the hospital record, these last few pages here.

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Mr. Edwards: That is right.

By Mr. Studt:

Q. Now, you were present throughout the entire autopsy, is that correct, Dr. Turner?

A. Yes, sir.

Q. Now you also stated in here that the fracture of the skull followed blow applied to head posteriorly perhaps by a piece of iron pipe?

A. Yes.

Q. That is your finding?

A. That is Dr. McIntosh—

Q. Well, you concur in that finding, though, is that correct?

A. Yes—yes, it is possible, I would say it was possible for it to be a small iron pipe or something like that, in other words.

Q. In other words, was the abrasion of such shape or form that it would fit in with an iron pipe or a club or some similar object like that?

A. Yes. Now, don't put this down.

(Then followed a short discussion off of the record.)

Mr. Edwards: I think you might give us that explanation again for the record.

Mr. Studt: Well, I think he has most of that in there on your questions.

[fol. 288] The Witness: Just the different types of fractures that you can get is what I meant.

Mr. Edwards: Different types of fractures, and you

[Page 16]

came to the conclusion this was the type of fracture described in this hospital exhibit or hospital record?

A. Yes, sir, that was my opinion of it.

Mr. Edwards: Well, go ahead.

By Mr. Studt:

Q. And it is very possible then in your opinion and judgment that this man could have suffered a blow by some, maybe, gas pipe or club or some similar round object?

A. Yes.

Q. Also in the hands of some individual?

A. Yes, it could be.

Mr. Studt: I believe that is all.

Mr. Edwards: Just a question or two.

Redirect examination.

By Mr. Edwards:

Q. This photostat copy of the hospital records, marked Plaintiff's Exhibit 1, the first page is written, you say, in your handwriting, the filled in part?

A. Yes.

Q. From the physician's report down?

A. Yes. The nurse gets this information from me.

Q. The top is filled in by the nurse and what is headed "Physician's Report" is in your handwriting?

A. Yes, sir.

Q. And the signature, W. E. Turner, Jr., is your signature?

A. Yes, sir.

Q. That is where you signed your name?

A. Yes.

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Q. And this record that Mr. Studt asked you about, the history and the like, is what you think may have been dictated to yourself by Dr. McIntosh and to—what is this other doctor associated with you?

Mr. Studt: Dr. Kessler?

A. Dr. Kessler I think was down there, too.

By Mr. Edwards:

Q. And you made the examination you state when the body came in St. Joseph's Hospital, and you were present when the autopsy was performed?

A. Yes, sir.

Mr. Edwards: I think that covers it.

Mr. Studt: I want to ask another question, Doctor.

Further Cross-examination:

By Mr. Studt:

Q. In other words, all your testimony here is given from this particular plaintiff's Exhibit 1 that has been presented to you and which you read, which included your physician's report and this doctor's autopsy—and the autopsy?

A. Which is correct, as far as I can remember.

Q. Yes, and the testimony that you have given here is exactly what is contained in this report, is that it?

A. Yes, yes, sir.

Further Direct examination.

By Mr. Edwards:

Q. In other words, to get it straight, Doctor, this hospital

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report here marked Plaintiff's Exhibit 1 is your examination and findings?

A. Yes, sir.

Q. And that is your opinion and that is given in this record?

A. Yes, sir.

Q. And one of the principal reasons for the examination at St. Joseph's Hospital was to determine the cause of death, I believe?

A. Yes, sir; yes, sir.

Q. And that is what you attempted to do, to determine the cause of Lyman Haney's death?

A. Yes, sir.

[fol. 290] Q. And the conclusions you reached were written into this hospital record?

A. Yes, sir.

Q. Doctor, you are now stationed at Fort Leonard Wood as a First Lieutenant?

A. Yes, sir.

Q. In the United States Army Medical Corps?

A. Yes, sir.

Q. You are staying temporarily over at Lebanon, Missouri, are you?

A. Yes, sir.

Q. You are married, I believe?

A. Yes, sir.

Q. Your wife lives over at Lebanon and you temporarily are making that your home?

A. Yes, sir.

Q. Now, it is rather uncertain, I suppose, where you will be stationed in the future or where you will serve, is it, Doctor?

A. I don't know where I will be tomorrow.

Q. You don't know where you will be tomorrow?

A. No.

[Page 19]

Q. You may be transferred soon to some other fort or some other station?

A. Yes, sir.

Q. In the service of the army?

A. Yes, sir.

Q. I suppose you intend to stay in the service of the United States until the war is over, Doctor?

A. Yes, sir; I suppose so; I think I will.

Q. We are just asking this for our record?

A. Yes; as far as I know.

Mr. Edwards: I think that is all.

And by agreement between counsel for plaintiff and counsel for defendants, the signature of the witness was waived and the deposition may be used with the same force and effect as if it were duly signed.

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[fol. 291] STATE OF MISSOURI,
County of Pulaski, ss:

I, Rufus L. Robertson, a Notary Public within and for the County of Pulaski, in the State of Missouri, do hereby certify that pursuant to the attached notice came before me at the Army Dispensary 1, Engineer Replacement Training Center, Group 6, Fort Leonard Wood, in Pulaski County, State of Missouri, W. E. Turner, Jr., who was by me first duly sworn to tell the truth, the whole truth and

nothing but the truth touching the matter in controversy aforesaid, that he was examined and his examination was reduced to shorthand writing by Joseph Feldman, a shorthand reporter of the City of St. Louis, and the signature of the witness was waived by agreement between counsel, on the day between the hours, at the place, and in that behalf aforesaid, and the testimony was transcribed into typewriting and is now herewith returned.

~~In Testimony Whereof, I have hereunto set my hand and seal this day of , A. D. 1941.~~

My commission expires July 28, 1945.

Notary Public within and for the County
of Pulaski, State of Missouri.

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The hospital record identified as Plaintiff's Exhibit 3 is narrated in the appellant's joint abstract of the record so that it does not give its full effect and meaning. We, therefore, set out Plaintiff's Exhibit 3, taken from the Bill of Exceptions, pages 227 to 230, inclusive.

[fol. 292]

PLAINTIFF'S EXHIBIT 3.

St. Joseph Hospital, Memphis, Tenn.

No.

Report of Emergency Case

3-5226 Mrs. Smith

12-21-39

8:10 P. M.

Name Mr. Lyman Haney

Phone 33745R

Address 37 W. McKellar

Age 48 Sex M S.D.W.

Religion Meth

Occupation Switchman

Employer I. C. R. R.

Relative Julia (wife)

Address Same

Brought by

Ambulance Thompson Bros.

Nat. Col.

Physician's Report

Temp. Pulse Resp. B. P. Lab.

Diagnosis Fractured skull,
Subdural hemorrhage

Treatment Dead when arrived

Where and How accident occurred Railroad yard, cause
undetermined, fractured skull by fast moving small round
object

Patient's general condition Deceased

What disposition was made of case: To morgue for
(Home, Ward, Referred to Dr.) autopsy

Signed W. E. Turner, Jr.

[fol. 293]

Permit for Autopsy

Memphis, Tenn, 12-21 1939

I hereby give the St. Joseph Hospital and its Representatives permission to perform an autopsy on the body of Mr. Lyman Haney.

Whose relationship to me is that of
Husband

Signed: Mrs. L. E. Haney

Witness: E. H. Mabry — Hazel Ashley R N

Autopsy # A-534

Autopsied 12-21-39

Mr. Lyman Haney

Autopsied by

Died 12-21-39

Dr. J. A. McIntosh

Assisted by Dr. Kessler

Brief History

The deceased is a white male, found dead in the railroad yard and brought to the St. Joseph Hospital.

External Examination

The body is that of a well developed, under average size male of about fifty years. There is an abrasion of the right posterior part of head approximately five centimeters long and one centimeter wide with depression of the skull under the abrasion involving occipital and parietal regions. The right side of the face is covered with wet dirty cinders ground into the face. The lips are bruised and cinders and blood and artificial teeth are in the mouth. Balance of body surface is free of abrasions, lacerations, or bruises. The extremities are freely motile. Rigor mortis is absent.

[fol. 294]

Internal Examination

Lungs: Average size and completely fill pleural sacs; surface smooth substance crepitant and airbearing mottled black greyish red color.

Heart: Average size and normal shape, small petechial epicardial hemorrhage along course of vessels, not dissected. Aorta average size. The muscle tissues are normal in color.

Liver: Average size with patchy areas of hyaline thickening of the capsule in two areas along lower border.

Spleen: Average size.

Intestines: Negative.

Urinary Bladder: Distended with urine.

Skull: Extravasation of blood into scalp, temporal and occipital muscles adjacent to above described abrasion of head. Fracture of calvarium radiating downward from abrasion to left and right involving right parietal occipital, right and left temporal and sphenoid bones. The accompanying hemorrhage covered the cerebrum and cerebellum. The brain substance was not grossly lacerated. The spinal fluid was clear.

Anatomical Diagnosis

Traumatic fracture of skull with associated meningeal hemorrhage.

Cause of Death

The fracture of skull followed blow applied to head posteriorly perhaps by a piece of iron pipe.

Signed,

J. A. McIntosh M. D.
Pathologist

[fol. 295] JOSEPH FELDMANN, being duly sworn on the part of plaintiff, testified as follows:

Direct Examination.

By Mr. Edwards:

Q. Will you state your name?

A. Joseph Feldmann.

Q. Where do you live?

A. 5711 Lasetts, St. Louis.

Q. What business are you in?

A. Shorthand reporter, etc.

(Witness Feldmann further testified on Direct Examination, Bill of Exceptions pages 236 to 239, inclusive:)

Q. I will show you in this case, depositions filed herein on August 29th, 1941, taken at Memphis, Tennessee, on May 1st, 1941, and call your attention particularly to the testimony of witness, John Joseph Drashman, page 189, and ask you to tell the Court and jury if you took down that testimony, and if you wrote that up.

A. Yes, sir; I took all of this, and this is the transcript of my notes.

Q. All right. I show you—I will direct you particularly to witness John Joseph Drashman, will you turn to that?

A. Yes, sir.

Q. I have asked you, I believe, to go over that testimony this morning.

A. Yes, sir; I compared the testimony this morning, and what is transcribed here agrees with my notes.

By Mr. Gentry: Mr. Edwards, I suppose you are offering this only as against the Frisco Trustees?

By Mr. Edwards: That is right. I should have stated that.

Q. This deposition shows that the signatures of all of the witnesses were waived?

A. That is correct.

Q. That is by agreement between Mr. Skinker and I?

By Mr. Skinker: That is correct.

[fol. 296] By Mr. Edwards: Now, if you want me to have him read his notes of the witness' testimony as to what he testified to before him down there on May 1st, 1941, in this deposition, I will—

By Mr. Skinker: (Interrupting) It would probably be easier for him to read the typewritten transcript.

By Mr. Edwards: I want to show the correctness of this testimony filed here in Court by witness Drashman's deposition. I want to show the correctness of it. It is not signed. The signature is waived, as all of the signatures in that deposition were waived, by agreement.

By Mr. Skinker: May I examine, your Honor.

By Mr. Edwards: Yes, sir.

By the Court: You may do so.

Cross-examination.

By Mr. Skinker:

Q. You have checked the typewritten transcript of your notes?

A. Yes, sir.

Q. You find the typewriting is the same as your notes?

A. That is correct.

By Mr. Skinker: Well, we make no point in the reading from the typewriting instead of his notes.

Direct examination (Resumed).

By Mr. Edwards:

Q. I asked you this morning to read over the entire deposition of witness Drashman?

A. Yes.

Q. And to compare it with your notes?

A. Yes, sir; I did, sir.

Q. Now, tell the jury if your notes correspond to the deposition, the deposition of Drashman filed in this court.

A. They do.

Q. Are all of the statements written in this deposition, the testimony of witness Drashman, the same as your notes?

A. They are.

[fol. 297] Q. And is all that is shown in this deposition that witness Drashman testified to—did you write down that all accurately as he gave it?

A. To the best of my knowledge; yes, sir.

Q. And is this deposition correct, according to your notes?

A. Yes, sir.

Q. In every respect?

A. Yes, sir.

Q. You read the entire deposition this morning, and compared your notes with it?

A. Yes, sir; I did.

By Mr. Edwards: I am doing this to shorten it so there will be no use in reading the notes. You may take the witness.

By Mr. Skinker: No examination.

(Witness excused.)

ALVIN ARTHUR HANEY of lawful age, being produced, sworn and examined on part of plaintiff, testified as follows, to-wit:

Direct Examination.

By Mr. Edwards:

Q. Will you give us your name?

A. Alvin Arthur Haney--etc.,

(Haney further testified in direct examination, Bill of Ex. 271:)

Q. When did you first receive word that your father had been killed or injured?

A. Well, I don't know exactly the time, but my mother came down there and told me.

Q. And did you go then with your mother to the hospital?

A. Yes, sir.

Q. What hospital was that?

A. St. Joseph.

Q. Did you see your father there at the hospital?

A. Yes, sir.

[fol. 298] Q. And was he dead when you saw him?

A. Yes, sir.

Q. And did you notice—could you see any injuries where he appeared to be injured?

A. Well, on the back of his head—well, I didn't exactly look at it, because I didn't like to look at anything like that—but my wife went with me, and she looked.

Q. Don't say what she said. I don't want that. As to his face, did you see anything?

A. His face had cinders and stuff ground into his face.

Q. On which side of his face?

A. On the right side.

Q. Now, after that, did you go to the railroad yards?

A. Yes, sir.

Q. And you say it was east of that switch?

A. Yes, sir.

Q. About how far east of that Frisco switch, was it?

A. Well, it was around six or eight foot.

Q. What was the condition, tell the jury, of the ground, the height of the ground where you saw this blood, with reference to the north rail, was it higher than or lower than the north rail of the Frisco tracks?

A. It was higher.

Q. And how much higher was that than the north rail of the Frisco tracks, where the blood was?

A. Well, to the best of my knowledge, I would say it was around eighteen or two foot—eighteen inches, or two foot, something like that.

Q. Was this ground north of the tracks, was that grass or of what material was it?

A. Cinders.

Q. Cinders, or what?

A. Cinders.

Q. Now, was there another railroad track on north of this Frisco track?

A. Yes, sir.

Q. And about how far, or what is the distance between the two tracks?

A. Well, I really couldn't say for sure, but I would say it was around fifteen foot between the two, as far as I know.

Q. And did this space between this Frisco track, the north rail, and this south rail of this railroad track north [fol. 299] of it, did that height along there vary in different places?

A. Yes, sir.

Q. It did?

A. Yes, sir.

Q. And some places it was higher than at other places?

A. Yes, sir.

Q. Did you ever work for the same road your father worked for?

A. Yes, sir.

Q. And when did you work for the—

A. I couldn't say for sure, but it seems to me like it was just about a year—the Christmas before that—Christmas.

Q. And who did you work for?

A. As far as I know, I thought I was working for the I. C. Railroad.

By Mr. Gentry: I didn't hear all of the answer—the Yazoo & Mississippi Valley Railroad, did you say?

A. The I. C., the Illinois Central.

By Mr. Gentry: I thought you said the T. M.

A. I said the Illinois Central.

By Mr. Edwards: Why do you say you worked for the Illinois Central Railroad?

A. Because that was where I got my checks, that is where I was hired.

Q. Where you were hired?

A. Yes, sir.

Q. Now, where was that, you say that is where you got them, where was that?

A. In the Grand Central Station.

Q. You mean the Illinois Central Station?

A. Yes, sir.

Q. And that is where you were hired?

A. Yes, sir.

Q. At the Illinois Central Station?

A. Yes, sir.

Q. And that is where you were paid?

A. Yes, sir.

Q. Now, were you paid by checks?

A. Yes, sir.

Q. You said that you worked for the same railroad your father worked for, how do you know that, what makes you think that?

A. Well, he got me the job, and it was right down there with him. And I got paid, as far as I remember, the same place he got paid.

Q. And did he get paid at the same place, you did?

A. Yes, sir.

[fol. 300] Q. And where was that you got your checks?

A. In the Grand Central Station.

Q. And whose office was it that you went into?

A. I don't know, sir.

Q. I mean, was there any signs on the office?

A. Well, I didn't pay any attention.

Q. But, it was in the Grand Central Station?

A. Yes, sir.

(Witness Alvin A. Haney testified Bill of Ex. pp. 283-284:)

Redirect Examination.

By Mr. Edwards:

Q. Just a question. You spoke of the ground where you saw this blood being about eighteen inches above the north Frisco rail—I believe you testified to that on direct examination?

A. Yes, sir.

Q. How did that level run back towards the Frisco switch stand?

A. It just beveled off, from a little ways up the other side of the switch until it got back to the right height.

Q. Do you mean about the same height?

A. No, sir; started from nothing and went up.

Q. Started from the track and went up to that?

A. Yes, sir.

Q. I see. Then you take where you saw this spot of blood the next morning, and go back east—rather west—towards the stand, going in that direction; would the height be about the same or different?

A. Well, it is different all along, I would say, it is just where they threw the dirt up.

Q. You mean in some places the dirt was higher and some places it was lower?

A. Yes, sir.

Q. Was the dirt generally higher from where you saw the blood back to pretty close to the switch, or to the switch back west was it about the same height; you say [fol. 301] it was different heights along there?

A. Well, I would say from about where the switch was, it was lacking about maybe a couple of feet from there starting building on up to the height.

Q. You mean about two feet around the switch was lower?

A. Yes, sir.

Q. And then the other was higher, did you mean that?

A. Yes, sir.

(Witness Hancy further testified on redirect examination by Mr. Edwards, Bill of Ex. p. 286:)

Q. If I understand you correctly then, this Frisco switch we are speaking of is within this block east of Florida Street, it is within the distance of that block?

A. Well, the only block there is between the two is Florida Street and Main Street. There is no streets between there between the railroads.

Q. Now, you have spoken about the streets, does Florida Street dead end to the railroad tracks, or is it so you can drive over the tracks there?

A. All you can do is to drive up on the tracks.

Q. It dead ends at the tracks from the north as I understand?

A. Yes, sir.

Q. So where your father was killed is that—is there a place for vehicles and automobiles to drive over that place?

A. No, sir.

Q. Is that just right-of-way and railroad tracks there?

A. Yes, sir.

Q. All railroad tracks?

A. Yes, sir.

[fol. 302] C. BRUCE FARMER, of lawful age, being produced, sworn and examined, on the part of plaintiff testified as follows, to wit:

Direct Examination.

By Mr. Edwards:

Q. Will you give us your name?

A. C. Bruce Farmer, etc.

(Witness Farmer further testified, Bill of Ex. pp. 290-291:)

Q. Just a little further describe how these mail hooks are fastened to the side of the mail cars; I mean, do they hang down, or what position are they in when not in use?

A. These mail—these catcher arms are fastened in the doorway; about halfway up the doorway on either side there is a steel rod that runs across the door, and these arms are fastened on that, so they work on a fulcrum,

and when not in use they hang down against the side of the car.

Q. That is what I am getting at.

A. And when they are in the used position they are horizontal.

Q. Now, can they swing out from the side of the car?

A. Well, yes, a slight distance.

Q. And how far can they swing out from the side of the car?

A. Oh, not to exceed a foot. I never saw one that did.

Q. And are they fastened so that as the train goes along, fastened so that the bottoms set against the trains, or the bottom will swing?

A. No, sir; they are not fastened at any place, except where they are fastened in the doorway.

Q. They can swing out then?

A. Yes, sir.

(Witness Farmer further testified on cross-examination, Bill of Ex. pp: 300-301:)

By Mr. Skinker: I hand you here a photograph which has been marked as Defendants' Exhibit C, and which pur-[fol. 303] ports to be a photograph taken in St. Louis yesterday of a Frisco mail car, down at the station, and it shows there 2054. I will ask you to look at it and ask you to state to the jury whether that shows--what is the word--catcher arm?

A. The catcher arm.

Q. The catcher arm of a mail car in ordinary position, and the type of arm you have described to the jury in your testimony?

A. Yes, sir; it does.

Q. And is that a fair and reasonable picture of the catcher arm, showing its construction and the way it is placed on the mail car?

A. Yes, sir; it is.

Q. Does that look like the catcher arms you inspected?

A. Yes, sir.

Q. And the ones you have on your cars?

A. Yes, sir.

Q. Something you want to point out about it?

A. Yes, sir; I want to point out the knob on the end of the catcher arm.

Q. Yes, sir.

A. It is possible to catch a pouch in there, and I have done it when the catcher arm was not in the proper position.

Q. But ordinarily it is through the V groove?

A. Yes, sir; but the knob is on the end either way you are going.

By Mr. Edwards: Show that so the jurymen understand what you are talking about.

By the Witness: I suggest if that is the part that hit you, it wouldn't make any difference whether you was going forward or backward, because the knob is round like that, but that is a true picture.

By Mr. Edwards: That knob is the lowest part of the arm, isn't it?

A. Yes, sir; and this door is open.

By Mr. Skinner: Now, this distance of eighty inches from the top of the rail up to the lower part of the catcher arm, is as shown there?

A. Yes, sir.

Q. And that is six feet and eight inches?

A. Yes, sir:

[fol. 304] (Witness Farmer further testified on redirect examination by Mr. Edwards, Bill of Ex. pp. 303-304, inclusive:)

By Mr. Edwards:

Q. Mr. Farmer, this catcher arm, all of these catcher arms are fastened very solid, are they not, to the train?

A. Yes, sir.

Q. Where they are fastened I mean.

A. Yes, sir; this part is solid; however, they can be slipped out of this bracket and turned around, but that part must be solid because catches are made sometimes with trains doing in excess of eighty miles an hour, and they have to be solid.

Q. Have to be very solid?

A. Yes, sir.

Q. To withstand an awful lot of pressure?

A. Yes, sir.

Q. This bottom of the catcher arm, as you have pointed out, is round, isn't it?

A. Yes, sir.

Q. About what size would that bottom be?

A. You mean what size steel it is made out of?

Q. How much in diameter?

A. Oh, it is about like that (indicating) about three inches.

Q. Between your thumb and finger, indicating about an inch and a half?

A. No, sir; it would be about three inches; that is a fair representation.

Q. I mean the extreme end; if it would drop down at the side of the car, is that the size you are indicating?

A. Yes, sir; this knob on here.

Q. That is round, isn't it?

A. Yes, sir; and that is about three inches there.

Q. And it is made of steel or some kind of metal?

A. Steel, and all I ever saw were the same shape on the end. I mean none of them was pointed because of the fact if they were pointed you might run them through a pouch.

Q. The lower part of the catcher arms are solid enough, the arm and the fastening; if it hit a man in the head it would not bend the arm, would it?

A. No, sir; I never saw an arm bent, except when you hit a bridge or a box car of some sort.

By Mr. Edwards: I think that is all.

Defendants' Evidence

[fol. 305] CLAUDE JOSEPH BRUSO, being duly sworn, on the part of defendants testified as follows:

Cross-examination.

By Mr. Edwards:

(Bill of Ex. p. 343, 344.)

Q. Haney's next duty, after that train back in there, was to close that switch, wasn't it?

A. Yes, sir; to close that switch and go back to his shanty.

Q. And he should have done that after the train backed in there, immediately after the train cleared the switch?

A. Yes, sir.

Q. That was a custom for him to do that?

A. Yes, sir; that was his duty.

Q. His duty to open the switch and remain there until the train backed in, and then go back to his shanty?

A. Yes, sir.

Q. That is the custom, isn't it?

A. Yes, sir.

Q. Now, north of this Frisco track it is uneven, isn't it, there is cinders there?

A. Well, there is cinders on all cinder tracks.

Q. I say, there is cinders on the north of the Frisco track, isn't there?

A. There is what they call the cleanings, just been thrown back away from the track there. I suppose that little pile along there, that little pile about eighteen inches, a rough guess.

Q. About eighteen inches above the rail, isn't it those cinders?

A. Yes, sir.

G. W. CREAGH, being duly sworn, on the part of the defendants testified as follows:

Cross-examination.

By Mr. Edwards:

(Bill of Ex. pp. 489 to 490.)

Q. How far were you from Mr. Haney when you first saw him there at that switch and stopped with the back [fol. 306] end of your train west of the Frisco switch?

A. Just a short distance.

Q. What do you mean by a short distance?

A. I suppose half the distance from here to that—to that table (indicating); maybe not that far.

Q. From you to the end of this table (indicating)?

A. Yes, sir.

By Mr. Edwards: That is about twenty feet, isn't it?

By Mr. Skinker: I judge so.

Q. Could you see him at that distance—could you see Mr. Haney how he was dressed?

A. No, sir.

Q. Was there any artificial light around there?

A. No, sir.

Q. Up over the switch or near it?

A. No, sir.

Q. Could you see whether he had any badge on his cap or on his coat from that distance, about twenty feet away from you?

A. No, sir.

J. E. MEE, being duly sworn, on the part of defendants testified as follows:

Cross-examination.

By Mr. Edwards:

(Bill of Ex. pp. 510 to 511.)

Q. You talked about having your head out; do you remember that you testified you only had your head partly out of the window in your deposition?

A. I had my head out the window just a little over like I always do, looking at the movement of the train.

Q. Looking at the back end of the train, do you remember that?

A. Yes, sir.

Q. Do you remember that you also testified that you didn't see any switch tender because you were looking at the back of the train?

A. Yes, sir.

Q. That is true, isn't it?

A. That is true.

[fol. 307] Q. You didn't see any of these switch tenders, did you?

A. No, sir.

Q. You don't know whether there was any switch tender along there, or not, do you?

A. No, I don't.

(Witness Mee again testified on Cross-examination, Bill of Ex. p. 513.)

Q. What I mean is, don't you recall testifying that if Mr. Haney had been knocked down on the ground there, you would likely not have seen him?

A. That is a fact.

Q. That is true?

A. Yes, I would likely not have seen him.

Q. There wasn't any electric light there, at the immediate switch, was there?

A. No, I don't think there was. I hadn't paid any particular attention to it.

(Witness Mee again testified on Cross-examination, Bill of Ex. pp. 514-515.)

Q. Did you look down at the ground on that occasion?

A. No, I was watching the movement of the train; I never looked down at the ground; I looked back.

Q. When you say you looked back, you mean you looked back to the rear end of the train?

A. I looked back as far as I can see the rear end.

Q. You looked back as far as you can see the rear end?

A. Yes, sir.

Q. Then you continued to look back as far as you could see on the train?

A. Certainly; and watched the gauges on the engine.

Q. You don't mean to say you know Mr. Haney wasn't lying at that switch when you passed it?

A. No, I didn't say that; I don't know nothing about it; I said I didn't see him there.

Q. After you passed Mr. Haney's switch, when you were backing up, did you look to the front of your engine, the [fol. 308] end the headlight was on?

A. The headlight was on until we got up in the yard to the station; we cut it out; but I never looked that way; when I am backing up I never look that way; what I mean, I never looked west.

Q. You never did look west?

A. No, I looked back to keep my eye on the movement of the train.

Q. From the time you got a signal to back up, from that time on until the time you backed up into the station, did you ever look back from the way you were coming?

A. You mean look—

Q. Look back to the front of the engine?

A. No, I never did; I never looked at the front.

Q. At any time?

A. No.

(Witness Mee further testified on Cross-examination, by Mr. Edwards, Bill of Ex. pp. 524 and 525:)

Q. You have seen them throw the switch and go into the shanty?

A. Yes, high ball you the switches are set with markers on them.

Q. They wouldn't go on the opposite side of the track in that case, would they?

A. No, they wouldn't.

Q. Don't you know they usually throw the switch; and either stand there or go into the shanty?

A. They throw the switch, line you up; and when the switch is lined up they give you a signal to come on; they have telephones in there to answer; they are busy, all the time.

Q. Those fellows don't walk across the track on the other side?

A. I don't know what their instructions are, but that is rule 104.

Q. They don't do that?

A. I won't say they don't do it.

Q. I am talking about what you see.

A. I am telling you about Frisco Railroad rule 104 says they must cross on the other side.

Q. How many have you seen in this yard cross to the opposite side?

A. I don't have much—there is not many switches in [fol. 309] this yard I have to observe, that is, with the switch tenders, only that "Y" switch, that one on the other side of the interlocking.

Q. Did you know Mr. Gates, the switch tender west of Mr. Haney?

A. I knew him by sight; I didn't know him personally.

Q. Did you ever see Mr. Gates at any time after he throw the switch for you to back in, walk over to the south side of the track?

A. They have got trains.

Q. Did you ever see Mr. Gates at any time walk over to the south side of the track?

A. I couldn't answer that. After he gives me a signal, I don't keep track of him.

(Witness Mee again testified on Cross Exam., Bill of Ex., pp. 528 and 529:)

Q. Was there any artificial light over the switch, or near it?

A. I didn't see none.

Q. If one had been there, you would have seen it, wouldn't you?

A. I would, I believe.

Q. You have never seen any artificial light over that switch?

A. Over the switch?

Q. Or near the switch?

A. No, near the switch I did not.

Q. No artificial light over any of those switch tender's switches, are there?

A. No, not that I know of; I don't know of any.

Q. When did you last back in over there?

A. When did I last back in over there?

Q. Over that switch?

A. There is a light there now. I didn't know what you were getting at.

By Mr. Gentry: Wait a minute; I move to strike out the answer the witness has just made voluntarily.

By Mr. Edwards: I want to find out this.

By Mr. Gentry: I want to make my motion to the Court and get a ruling.

By Mr. Edwards: I want to find out if there is any difference in the ability to see things with a light, than there would be without any.

By Mr. Gentry: I am trying to make a motion. I make the motion to strike out what the witness voluntarily said, then Mr. Edwards can state a new question if he wants to, but that was made voluntarily and should be stricken out.

By the Court: Motion sustained; that may be stricken.

By Mr. Edwards: Is there any difference with the light over this Fraisco switch stand compared without the light over it, in your ability to see there at night time?

By Mr. Gentry: Are you referring to the present time?

By Mr. Edwards: I mean conditions the same as they were when Mr. Haney's accident happened.

By Mr. Gentry: I don't get the force of your question?

Do you mean to ask him the question if a man can see better with a light than he can without a light?

By Mr. Edwards: That's right; I want to see your ability to see without a light as compared with your ability to see with a light.

By Mr. Gentry: No objection to that; everybody knows you can see better with a light than you can in the dark.

(Witness Mee testified again in Bill of Ex. at pp. 532-534:)

Q. That would be 7:30, take about 7:30 P. M. or about December 21, near the 21st, what would you say the difference is as to how far you could see an object as large as a man with the light as compared to that when you had no light at this place?

By Mr. Gentry: I have no objection to that.

By the Witness: Shall I answer?

Q. You may answer.

A. I can't answer the question because I don't know; I never made no inspection of the light and I couldn't tell you.

Q. Could you answer the same question as to your ability to see an object as small as—oh, say, a rod from one inch in diameter to three inches in diameter?

A. Could I see a rod?

Q. Yes, with the conditions the way the light was the night Mr. Haney was killed, how far would you say, with the condition the light was in that night, you could see a rod near that switch say one inch in diameter?

A. How far I could see it?

Q. Yes, with the condition of the light at that switch, how far would you say you could see a rod one inch in diameter?

A. I don't know about the light at the switch; I never made no test of the light.

Q. Could you tell me how far you could see a rod, say it was two and a half inches in diameter?

A. How far I could see a rod—how far away?

Q. Yes, how far at that switch, with the conditions the way the light was the night Mr. Haney was killed?

A. I couldn't say; I don't know.

Q. Do you think you could see an object such as I have described as far as fifty feet away?

A. I don't believe I could.

Q. Or twenty-five feet?

A. I couldn't say; I don't know.

(Witness Mee testified again at pp. 534 to 536 in Bill of Ex.:)

By Mr. Edwards: Look here, Mr. Skinker, are there any buildings in here on this "Y"? Do you know whether there are, or not? The train pulls over west (indicating) and backs in here (indicating). Are there any buildings here north of your Frisco tracks on this "Y"?

By the Witness: There is the Stratton warehouse.

Q. Is that in here (indicating)?

A. Yes, sir.

By Mr. Skinker: That is to the left.

Q. Your train backs around that?

A. Around the curve by that Stratton warehouse.

[fol. 312] Q. But there is no buildings at this "Y" outside of that switchman's shanty?

A. That is all.

Q. The switchman's shanty is the only thing on the "Y"?

A. Yes, sir.

Q. This Stratton hardware building—

A. Is on the north side.

Q. West of where you back in?

A. North.

Q. North and west; you back around?

A. Yes, you back around the "Y."

Q. How far west of this Frisco shanty—I mean this Frisco switch, is your track straight?

A. West of the "Y" switch?

Q. West of the switch where Haney was, how far west of that was your track straight?

A. I guess five or six hundred feet.

Q. Then it goes around a curve to the north?

A. Yes.

Q. Then—

A. To the west.

Q. Curves to the west?

A. You said the north.

Q. You are going west, then you curve to the north, after you get up there some distance west?

A. You go over the bridge around that same track that leads onto the bridge.

Q. But the track is straight so you can see west?

A. After you cross Kentucky street, it is fairly.

Q. Four or five hundred feet you can see west of Mr. Haney's shanty?

A. I expect you can.

Q. The Frisco track is almost straight. This engine and cars when you back around this switch that Mr. Haney tends, it immediately starts turning to go north into the station?

A. Yes, after you get to the east of the warehouse and get in the I. C. yards, it does.

By Mr. Edwards: That is all.

[fol. 313] C. J. Brusco, recalled, further testified on behalf of defendants, as follows:

Direct examination.

By Mr. Gentry:

(Bill of Ex. pp. 542-545)

Q. When a man throws a switch, no matter whether he is called a switchman or a switch tender, the train is standing and waiting for him to throw the switch, what is his next position after he throws that switch, where is he instructed to go?

A. The railroads require him to step on the other side of the track, or either back away from the switch twenty feet, I think it is.

Q. Does the switchman do one or other, depending on the local circumstances?

A. Depends on all conditions when you hit the switch. It isn't customary a man backs away all the time in switching service.

Q. But does the rule say he shall cross the track?

A. The rule says either to cross the track on the opposite side—

By Mr. Edwards: If your honor please—

By Mr. Gentry: That is all, you may examine.

Cross-examination.

By Mr. Edwards:

Q. Do you recall, Mr. Brusco, testifying that Mr. Haney's next duty was to close that switch near where you found his body?

A. Yes, sir.

Q. That was his next duty, wasn't it?

A. Yes, sir.

Q. And his duty was to close that immediately after the Frisco train had cleared it, wasn't it?

A. Yes, sir.

Q. I believe you said his duty then was to return to the shanty and turn this light over the shanty so that those engines headed north could go across the tracks?

A. Yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

[fol. 314] Q. Why didn't you state the rule that Mr. Gentry talked about when I asked you in the deposition, and I asked you I believe, here at the trial the other day, what the next duty of Mr. Haney was after he had thrown that switch? Why didn't you say his duty was to step back twenty feet, or go across the tracks?

A. There wasn't anything said about the rule, you asked me what his next duty was.

Q. That's right.

A. And I answered your question.

Q. His next duty was to throw this switch back, reline it?

A. Yes, sir.

Q. You have been up here since the trial started?

A. Yes, sir; I came up here from Memphis when it first started.

Q. I believe you spoke the other day of a claim agent, what is the name of the I. C. Railroad claim agent?

A. Mr. Munson.

Q. Has he been around the court here?

A. Yes, sir.

Q. During the trial?

A. Yes, sir.

Q. Have you been talking with him?

A. Oh, yes, I have talked to him every day.

Q. Talked to him this morning?

A. Yes, sir.

Q. Who is the claim agent for the Frisco Railroad Company?

A. Mr. Westbrook.

Q. Has he been around the court room during the trial?

A. He has been around with the Frisco men.

Q. Has he been around this court room?

A. Yes, sir.

Q. Is he in the court room now?

A. No, sir.

Q. Is the other claim agent in the court room now?

A. Yes, sir.

Q. Have you talked to these claim agents since you have been here about the case?

A. Yes, sir.

Q. Those are the same two claim agents that were in conference there the next day for an hour and took pictures of this place introduced here, aren't they?

A. Yes, sir.

[fol. 315] JOHN ROBERT BURNS, being duly sworn, on part of defendant Illinois Central Railroad Company, testified as follows:

Cross-examination.

By Mr. Edwards:

(Bill of Ex. pp. 561 and 562)

Q. I show you what has been identified here as Frisco Exhibit F and ask you to look at that. Did you ever see that before?

A. I wouldn't say for sure whether I had, or not.

Q. Did you know that that contract was in existence?

A. Yes, sir.

Q. And this—the Yazoo and Mississippi Valley Company's name is not mentioned in that contract, is it?

A. No, sir, it didn't necessarily have to be.

Q. Why did you add that?

A. Because it isn't necessary.

Q. All right. Is the Yazoo and Mississippi Valley Railroad signed to this contract (handing witness a paper), to operate trains out of the Grand Central Station?

A. I wouldn't think so.

Q. Look at the other end of it.

A. It is signed by William Atwill; he was Vice-President and General Manager of the Y. & M. V.

Q. What does it say he is there?

A. Illinois Central Railroad Company.

Q. That is the way he signs that contract, isn't it?

A. Yes, sir.

Q. He signed this contract on April 18, 1935, for the Illinois Central Railroad, didn't he?

A. Yes, that's right.

Q. That was to pay two-twelfths of Mr. Haney's wages, that is, the Frisco to pay it to the Illinois Central Railroad, wasn't it?

A. Yes, sir.

[fol. 316] (Witness Burns testified again, Cross-Examination, by Mr. Edwards, Bill of Ex., pp. 564-565:)

Q. You say this Mr. Atwill, who has signed here as Vice President—

A. Vice President and General Manager.

Q. —of the Illinois Central Railroad; you say he is also an officer of the Yazoo and Mississippi Valley?

A. Yes, sir, he is of the system; he has charge of the system; he has charge of the G. S. L., the Yazoo and Mississippi Valley, and the Illinois Central.

Q. Where has your office always been, in the Grand Central Station there?

A. Most of the time, yes, sir.

Q. It is there now, isn't it?

A. Yes, sir.

Q. How long have you been in that station?

A. My office has been in the station since September, 1914.

Q. How much time did Mr. Haney lose from his work in the last six months of his life?

A. He worked pretty regular, as I recollect it; I don't know; I would have to look up the record.

Q. You heard Mrs. Haney, and checks we showed her, where he drew between \$160.00 and \$170.00 a month; that would indicate he worked every day, wouldn't it?

A. Pretty regular.

Q. Almost every day?

(Witness Alvin A. Haney testified, Bill of Ex., pp. 570 and 571:)

[fol. 317] **Plaintiff's Testimony in Rebuttal**

ALVIN A. HANEY, recalled, further testified on behalf of the plaintiff, in rebuttal, as follows:

Direct examination.

By Mr. Edwards:

Q. You were on the witness stand a few days ago, and were sworn before, weren't you, Mr. Haney?

A. Yes, sir.

Q. You testified the other day you went to this Frisco switch near where your father was killed that evening after you had gone to the hospital; tell us about what time you arrived there?

A. I imagine it was around 8:30 or 9 o'clock.

Q. You say you saw someone there?

A. Yes, sir.

Q. Do you know the name?

A. No, sir.

Q. Did they appear to be dressed as railroad men?

A. Yes, sir, they did.

Q. When you were there near that switch on that occasion, would you say whether or not you could see a thing as large as a three-inch pipe twenty-five feet away?

A. No, sir, it was too dark.

Q. You couldn't?

A. No.

Q. Of course, a one-inch pipe you couldn't see as well as a three-inch?

A. No, sir.

Q. This switch stand, when you arrived there, what was the color of the light?

A. As far as I can remember, it was green.

Q. Green?

A. Yes, sir.

Q. Did you have a flashlight with you?

A. No, sir.

Q. Did these other parties there have a light of some kind?

A. A lantern.

Q. A lantern?

A. Yes, sir.

[fol. 318] (Witness Alvin A. Haney testified again on direct examination, Bill of Ex., page 573:)

By Mr. Edwards: Three and a half or four inches in diameter, that switch stand. I will ask you if you could see underneath this green light, the stand part, when you were within twenty-five feet of it that night?

A. No, I couldn't.

Q. Now, it was the next morning that you went back there, I believe you told us?

A. Yes, sir.

MRS. JULIA B. HANEY, being recalled for further examination, testified in behalf of plaintiff in rebuttal, as follows:

Cross-examination.

By Mr. Gentry:

(Bill of Ex., p. 581.)

Q. Now, you say Mr. Brusco told you he had made his statement to the Illinois Central claim agent and if you wanted it you would have to go there to get it? That is what he said?

A. That is what he said.

(Mrs. Haney testified further on Rebuttal, Cross-examination, Bill of Ex., page 582:)

Q. Didn't he say, "Then he threw the switch after he passed over the track, he passed the time of day with me and stood on the south side of the track while the train went by and I don't know what became of him"?

A. He didn't tell me anything where Mr. Haney was standing.

Q. Didn't he tell you he saw him cross the track?

A. He did not. He didn't tell me a thing in the world.

Q. But you said he did tell you he passed the time of day?

A. Yes, sir.

Q. That was at the switch?

A. Yes, sir.

By Mr. Gentry: That is all.

[fol. 319] Redirect examination.

By Mr. Edwards:

Q. Have you testified to all Mr. Creagh did tell you on that occasion?

A. That is all I know.

Wherefore, respondent tenders this his additional abstract of the record in this case and prays that the same be accepted by this Court as such.

Respectfully submitted, N. Murry Edwards, James A. Waechter, Douglas H. Jones, Attorneys for Respondent.

[fol. 320] And thereafter and on the 1st day of May, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E. Haney, Deceased, Respondent,

vs.

J. M. KURN, ET AL., Appellants

Come now the parties, by their respective attorneys, and after arguments submit the above-entitled cause to the Court.

And thereafter and on the 4th day of June, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

WALTER A. LAVENDER, Administrator de bonis non of the Estate of Lyman Elmar Haney, Deceased, Respondent

vs.

J. M. KURN and FRANK A. THOMPSON, Trustees of St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company, a Corporation, Appellants

Appeal from the Circuit Court of City of St. Louis

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be reversed, annulled and for naught held and esteemed, and that the said appellants be restored to all things which they have lost by reason of the said judgment; and that the said appellants recover against the said respondent their costs and charges herein expended, and have execution therefor. (Opinion filed.)

Which said opinion is in words and figures following, to-wit:

[fol. 321] IN THE SUPREME COURT OF MISSOURI, DIVISION
NUMBER ONE, MAY TERM, 1945

No. 39,174

WALTER A. LAVENDER, Administrator de bonis non of the
Estate of L. E. Haney, Deceased, Respondent

vs.

J. M. KURN, ET AL., Trustees of St. Louis-San Francisco
Railway Company, Debtor, and Illinois Central Railway
Company, Appellants

Action under the Federal Employers Liability Act, 45
U. S. C. A., Secs. 51 et seq., to recover damages for the
death of L. E. Haney. Verdict and judgment for \$30,000
went for plaintiff and defendants appealed.

Haney was a switch tender in the railroad yards at
Memphis, Tennessee, and was killed, while on duty, De-
cember 21, 1939, about 7:30 p. m. by being struck in the
back of the head by some object. If deceased was an
employee of defendants, then it is conceded the cause is
properly under the Federal Employers Liability Act.

Error is assigned (1) on the refusal of a demurrer to
the evidence; (2) on the admission of evidence; (3) on
giving plaintiff's instruction No. 2 and refusing defendant
trustees' instruction C; and (4) on an alleged excessive
verdict. One phase of the alleged incompetent evidence
is of importance in connection with the demurrer as we
shall see.

It was plaintiff's theory that Haney was the employee
of the trustee defendants *and* the Illinois Central, and that
his death was caused by being struck by a mail hook or
mail catcher arm, hereinafter for the most part, referred
to as the mail hook, swinging out from the side of a Frisco
mail car. Defendants contend that there was no substantial
competent evidence to support such theory, and it is con-
tended that Haney was not the employee of the Frisco
trustees *or* of the Illinois Central, but was the employee
of the Yazoo & Mississippi Valley Railroad Company. The
[fol. 322] demurrer raises two questions: Was there sub-
stantial competent evidence that Haney was struck by the
mail hook? and, Was there substantial evidence that Haney
was the employee of defendants?

The Frisco train involved was a passenger train, consisting of 12 cars, made up of 3 baggage cars, 1 mail car which was next to the tender; other cars were Pullmans and chair cars. The train was from Birmingham, Alabama, and its destination was Kansas City, Missouri. The Frisco tracks in the yards extend east and west and the Illinois Central tracks extend north and south. The Frisco train approached from the east, but stopped east of the Illinois Central tracks. Haney's shanty (office) was west of the Illinois Central tracks, and north of the Frisco mainline track, on which the Frisco train approached from the east. The Illinois Central's Grand Central station was about 2700 feet north of the Frisco mainline track. There was a Frisco switchstand about 200 or 250 feet west of Haney's shanty and on the north side of the mainline Frisco track, by which switch the tracks were so lined that a train could back into the Grand Central Station. In order to reach the Grand Central Station the Frisco train moved west on its mainline track until the rear passed this switchstand, and then Haney lined the switch so the train could back into the station.

The Frisco train started up from the point where it had stopped east of the Illinois Central tracks, moved west until its rear was 20 or 30 feet west of this switch; Haney, as stated, then lined the switch and the train backed east to the switch and there entered the track which turned north to the station. Rule 104, so defendants claim, required Haney, after he lined the switch, to cross to the south side of the track, and the Frisco conductor, who was standing on the rear of his train, testified that he (Haney) did so cross after he lined the switch, and the last he saw of him "he was standing south of the track." But it was Haney's duty to close the switch when the train cleared, then return to his shanty and give the green light to any train that wanted to cross the Frisco tracks. The Frisco train cleared the switch backing into the station, but the red lights at Haney's shanty remained on. Investigation was made by John Joseph Bruso, yard conductor of the Illinois Central, [fol. 323] and Haney was found unconscious on the north side of the track with a wound in the back of his head. An ambulance was called, but he was dead when the ambulance arrived at the hospital.

On the north side of the track at the switch was a mound about 2 feet in height which came up within about 3 feet

of the north rail. The overhang of the Frisco mail car was about 2 feet, hence the mound came up or extended south to a point about one foot north of the side of the mail car as it passed the switch. Based on the evidence of plaintiff's witness Farmer, *infra*, the only witness who testified about mail hooks, it could be inferred that there was a knob like iron curl or ring on the end of the mail hook on the side of the mail car which passed over the switch Haney lined, which knob, when the arm is down and resting against the side of the car, is about 6 feet 8 inches above the top of the rail, which is 7 inches high. The ties were imbedded at the switch so that the tops thereof were about level with the ground. Hence the knob at rest against the side of the mail car was 6 feet 8 inches above the ground level, or 4 feet 8 inches above the top of the mound. Haney was about 5 feet 8 inches in height, and standing on the mound the top of his head was one foot higher than the knob at rest against the side of the car. The wound was on the back of Haney's head, and, it may be inferred, about 4 inches below the top of the head, hence, with Haney standing erect on the mound, the knob was 8 inches below the place of the wound. However, as we understand, the mail hook ascends as it extends out. In stating the evidence of witnesses, we have made some omissions, appearing in the record, but we have omitted the usual signs of omission.

C. Bruce Farmer, a witness for plaintiff and referred to, *supra*, testified: "I live in Kirkwood, Missouri; am a railway postal clerk; run on the Burlington; have been running on the railroad as a railway mail clerk since 1925; last night I made some measurements of mail pouch hooks on trains; I measured a Frisco car and it was 6 feet 8 inches from the bottom of the catcher arm to the top of the ties. When the (side) door is closed, the catcher arm could swing out a little ways, and when it swung the full [fol. 324] distance it was 7 feet 3 inches from the bottom of the catcher arm to the top of the ties. With the door open (and the handle pulled down inside) it would have been 9 feet from the top of the ties. I measured another Frisco car and it (mail hook) was 6 feet 8 inches from the top of the ties. These measurements are from the top of the ties up to the bottom of the iron hanging down. In my experience I have seen the catcher arm swing out (with door closed) as far as a foot. If the door is open (and

handle pulled down) the catcher arm can swing out as far as 2 feet 2 inches, to 3 feet, but they won't swing out unless somebody pulls them up; somebody has to get hold of the handle and pull them up. They won't swing more than 12 inches without that (there was no evidence that the door was open or handle pulled down); it pivots just from the sway of the train. They won't swing any farther with the door open. I have never seen those catcher arms swing out without any force from the mail operator more than one foot from the side of the car, and that would ordinarily be going around a curve or at an excessive speed of the train so that it would rock.

"In coming into the Union Station at St. Louis, nearly all of the trains pull up and back around a curve with the back end going into the station first. I have seen that done hundreds of times. In backing in at a speed of 10 miles an hour or less over a switch, if the track was smooth, would not throw the mail catcher arm out from the bottom of the car at all, but if the track was wavy, it might. It might come out a little distance from the bottom, but ordinarily not as much as a foot from the side of the car. The mail catcher arm itself is about 26½ inches, but the bracket takes up 3½ to 4 inches and the total makes an extreme extension of about 30 inches. The bottom of the catcher arm is round and is about 3 inches in diameter. I mean the knob down at the extreme end. The end of the catcher arm which I have designated as a knob is more correctly designated as a loop. It is round, but is like a ring and curved so it won't run through a pouch." [fol. 325] J. E. Mee, engineer on the Frisco train involved and a witness for defendant, testified: "We went the length of 3 cars and a locomotive beyond that shanty (Hancey's Shanty) and stopped on a signal from the conductor on the rear of the train. I got a blast of 3 whistles on the air from the conductor to start backing up. I couldn't see the back end of the train from my position in the cab because of a curve. In starting the backward movement I always looked back at the movement of the train, turned and faced the rear end, in the direction we were going, and watched the movement of the train. That is my duty, to look down to the back and alongside my train as I start backing. We lean out of the window to do that. It is up to the engineer whether he leans out the side or looks through the rear vision window. The first cars I was

looking at would be the mail and baggage cars, and I was looking back along the north side of them and as far back as I could see. As we made that backward movement the conductor controlled the air brake on the train from the rear end of the train. We stopped the train on that occasion before we got into the station and, with his signal which I had to get from him before I could move, I started again. I could see nothing of the rear end. It was on the curve and out of sight. After stopping and getting his signal to proceed, I backed on clear into the station. I did not see Haney or any person at that switch as I approached (backing in) and passed it. I didn't see any person lying on the ground or standing up there or anybody at all near the side of my train. I was at all times looking out of my window toward the rear and past the side of the mail and baggage cars at the head of the train. I was backing around the curve to the left and north and upgrade. We were going approximately 8 miles an hour before I got the signal to stop. I suppose we backed up about 300 feet or something like that when I was stopped. After that I got another signal to back up and I backed up and continued backing on into the station.

It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches. But in this connection [fol. 326] there are two questions: Was there substantial evidence that the mail hook extended out to any extent as the mail car was backed by the mound and over the switch? and, Was there any substantial evidence that Haney, when struck, was standing at a point or place on the mound where he could have been struck by the mail hook extended as the mail car passed the switch and mound?

Both sides of the Frisco train were examined before it left the station and nothing was found extending out from the sides. As appears, supra, Brusio, yard conductor for the Illinois Central, made an investigation when the red light did not change at Haney's shanty. Brusio was the first, so far as appears, to see Haney after he was injured, and as a witness for defendants, testified that Haney was lying on his stomach, body extending north and south, and was 14 feet west of the switch; that the right side of his face was down and his head 5 feet 9 inches (determined by actual measurement) north of the north rail of the Frisco

track with the feet extending back north; that there was a small pool of blood right at his mouth; that "there was a small space where his toes had dug (south) as the weight of his body, where he fell forward. I imagine those marks were 12 or 13 feet north of the north rail of the Frisco track. They appeared to be about the length of his body back from his head as though slipped forward. I was the first one to him. There was nobody else around there that I could see anywhere at that time." There was a telephone pole "immediately north of where dragging of his feet was."

Bruso, after seeing the situation, went back east "just the other side of Haney's shanty", and called Bundy and Arnold, Illinois Central switchmen, and told them Haney was hurt, and Bundy went back to Haney with Bruso; no one was there when they arrived. Bruso further testified: "We raised up Mr. Haney's body and turned him over. When we raised him up his left hand was at his chest with his lantern in it. His right hand was on the lower part of his stomach with his pistol in his hand loose. His hand was open and his pistol in it. We turned him around to the northwest so that his head would be at the side of the mound."

[fol. 327] As a witness for plaintiff Bundy testified: "When we (Bundy and Bruso) got to the switch we found Mr. Haney lying on the ground, face down. He was north of the switch and a little to the west of it, probably 2 or 3 feet west. His head was pointed south, kind of an angle. The Frisco track runs east and west at the point. Haney's head was pointed a little south and east and his feet extended northward, kind of an angle. I would say Haney's head was about 6 feet from the switch, that is north of it, and a little to the west. * * * I saw a pistol lying under Haney's body. I think Haney was about 5 feet 10 inches in height. I would say his feet were about 10 feet north of the north rail of the Frisco track and extended straight back of him, not doubled under him. We turned him over. Before we turned him over I saw right on the back of his head a gash about 2 inches long. It was bleeding. I saw no other injury. Mr. Bruso and I were the only ones present when we turned him over. Before we turned him over I did not see his lantern or pistol. After I turned him over I saw that the pistol and lantern were under his body. When we turned him over the pistol came into

view. It indicated it might have slipped out of his pocket, and probably did. His clothing showed nothing to indicate a struggle. The Frisco train had just backed east and turned north into the station. After that Frisco train backed in, to the best of my knowledge, I would say it was 10 minutes before we went up there and found Mr. Haney's body. During that 10 minutes I had been waiting for a signal that Mr. Haney operates over in his shanty.

"The first man who came up after us to the scene was Mr. Cowan (I. C. switchman—not a witness). The two of us (Bruso and Bundy) didn't remain there very long, not over 5 minutes, if I remember right. Bruso then went and called an ambulance. We turned Haney around and I raised him up and put his head in my lap, squatted down and put his head in my lap. He was alive, but not able to talk. His face was bruised from hitting the ground. I believe the bruise was on the left side of his cheek bone and there were cinders on his face. It appears that the injury to his face was caused by hitting the cinders with his face in falling. [fol. 328] I don't think it was more than 10 or 12 minutes after the ambulance was called until it got there. In turning Haney over we turned him toward the east and turned around to the north and east, turned his head more to the north."

Alvin Haney, son of deceased, was at the Frisco switch shortly after his father was removed in the ambulance, and also went to the switch next morning. When there shortly after his father was removed, it was too dark to see well. He testified as to what he observed next morning: "From what they showed me I will say there was a spot of blood from 6 to 8 inches across. It was east of the switch and north of the Frisco tracks. I would say it was between 3 and 4 feet north of the north rail of the Frisco track and around 6 or 8 feet east of that switch."

E. L. Gates, dispatcher for the Arkansas & Memphis Railway Bridge Terminal Company, was a witness for plaintiff. He said that when he arrived Haney was on top of the mound, north of the switch, and 12 or 15 feet "due north from the north rail of the Frisco track, lying on his back with his feet toward the track, his feet nearest the track. Someone, I don't know who, was holding his head up. That mound north of the tracks near the switch was, I would say, about two feet high, that is, above the rail of the Frisco tracks. I would say it was possibly ten or twelve feet from

the mound to the north rail of the Frisco tracks. It was just loose dirt that had been thrown out there until it was built up to the height of possibly two feet, and I would say that the base of it came probably within ten feet of the north rail. That was down at the level of the ground, and then it slopes back a little to the peak of the mound. I know nothing more about the case other than that Haney was wearing a white cap and it was new or practically new, had not become soiled; and I looked at the cap and at a point on the back of it there was a dirty spot on the outside of the cap. There were no blood stains, but just a black spot, and I was told later that that corresponded with the location of the injury on the back of his head, a little to the right of the center of the head, and a little lower than the crown of the head. Possibly just a little above the top [fol. 329] of the ear. The mark on the cap was about the width of my finger and possibly an inch and a half long. It seemed like it just angled down, not across."

Dr. W. E. Turner, Jr., witness for plaintiff, testified that at the hospital he assisted in the autopsy on the body of Haney on the night he was killed and "our conclusion was that the skull was fractured by some fast moving small round object. I guess it would be possible for that small round fast moving object to be a rod or something projecting out from a train that was going 8 or 10 miles an hour. I don't know anything about it, but I think it could be. Maybe an iron pipe."

John Joseph Drashman, Frisco coach foreman, was plaintiff's witness. Plaintiff took his deposition and when plaintiff offered the deposition at the trial, objection was made because the witness was present. Drashman testified at the trial that he went to the place of Haney's injury with the Frisco superintendent of terminals, but that Haney had been removed when he arrived. In his deposition he said he went before Haney was removed and testified as to where Haney was lying and about the wound, etc. In the deposition and at the trial he testified he examined the fireman's side of the train more carefully than the engineer's side and did so because he was told by an Illinois Central switchman that Haney "was supposed to have been struck by something protruding on the side of the train." In the deposition he said that this was told to him at the place of injury and while "Haney's body was lying on the ground."

It appears in the record that the area immediately about the switch was not very well lighted, was dark, and that at night, in this area, many hoboes and tramps, white and colored, "hop freight trains and get rides out of there." Such situation was likely the reason for Haney having a pistol. The police homicide squad made an investigation of Haney's death and the measurement referred to, *supra*, in the evidence of Bruso, was made by the police in Bruso's presence. Six days after Haney was killed his billfold was found on a high board fence railing about a block from the place where Haney was killed. It contained no money, but [fol. 330] contained Haney's social security card and other things. The billfold was not soiled; "it did not appear to have been lying out in the rain or snow." It was found near the place where Haney was placed in the ambulance. Haney had a gold watch and a diamond ring. These were "still on him at the hospital. He never carried much money, not very much more than \$10."

Plaintiff contends that the evidence of Drashman as to what was told to him by an Illinois Central switchman was competent under the rule of *res gestae*, and that under all the evidence plaintiff made a submissible case on the question as to whether Haney was struck by the mail hook. There was no evidence, expert or otherwise, that the condition of the track and the speed of the backup movement, and whatever curve there was, all considered together, might have caused the mail hook to swing out the 12 or 14 inches necessary to strike Haney, assuming, of course, he was standing on the mound and at a place where such swing out would reach him. Can such extension of the mail hook be reasonably inferred from the evidence of Farmer and all the other facts and circumstances? Would such an inference be based on speculation and conjecture? Also, there is the question, assuming that the mail hook so extended out, Was there substantial evidence that it was the mail hook that struck Haney? It would seem reasonable that if Haney was struck by the mail hook he would have fallen at least somewhat parallel to the track, but the evidence of those first to him is that when Haney was found he was some 6 feet north of the north rail and lying at right angles to the track with his head toward the track and his feet extending back north. And there was evidence that his toes had dragged forward (south) some few inches in falling, as if the blow had come from the north when he

was facing south. Alvin Haney, however, said that the blood was between 3 or 4 feet north of the north rail.

As indicated, *supra*, the competence of the evidence of witness Drashman as to what the unnamed Illinois Central switchman told him about it being supposed that Haney was struck by something protruding on the side of the train is of importance in connection with the demurrer to the evidence. As stated, plaintiff contends this evidence is competent under the rule of *res gestae*. Many cases are cited on the *time* element in *res gestae*, but for such element [fol. 331] ment we will assume without deciding, that the evidence as to lapse of time is sufficient under the rule of *res gestae*. It is not claimed that the unnamed switchman who made the statement to Drashman was speaking from his own knowledge, but from what he had heard. In other words, the *statement itself* claimed to be competent under the *res gestae* rule was based on *hearsay*. Can such, under any circumstances, be competent under the rule of *res gestae*? We do not think so.

In the brief counsel say: "Statements of strangers ordinarily classed as hearsay will be admitted as *res gestae* if they are made as a part of the transaction and so closely connected therewith that the witness has no time to reflect or to make up a story that is not true." In support of such contention many Missouri cases are cited. Among these are *Roach v. Kansas City Public Service Company* (Mo. Sup.), 141 S. W. (2d) 800; *Pryor v. Payne*, 304 Mo. 569, 263 S. W. 982; *Brinkley v. United Biscuit Co., et al.*, 349 Mo. 1227, 164 S. W. (2d) 325; *Sconce v. Jones*, 343 Mo. 362, 121 S. W. (2d) 777. We have examined all the cases cited by plaintiff and find that in each case the statement held competent under the *res gestae* rule was made by one having first hand information. We find no case where it has even been contended that a statement based on hearsay, as in the present case, may be competent under the rule of *res gestae*. It is true that the *res gestae* rule of evidence is an exception to the hearsay rule, but this does not mean that what we may term the *res gestae* evidence may be based on hearsay. This is quite clearly indicated in the *Sconce* case, *supra*, in which, and in dealing with the *res gestae* rule, it is said (121 S. W. (2d) 1 c. 781):

"The principal reason for excluding testimony as to statements made by others out of court is that the test of cross examination, of the person making them at the time they are

made, is unavailable as a safeguard against falsification or inaccuracy. This is the basis of the hearsay rule. The statements, herein involved, must come in, if at all, under the classification of the exception (*res gestae*) of the hearsay rule, which under certain circumstances permits testimony as to *statements, made by a person involved in or present at an accident* (italics ours), declaring the circumstances of an injury at or after its occurrence."

[fol. 332] We think it quite clear and therefore rule that the statement of the switchman that Haney was supposed to have been struck by something protruding on the side of the train was not competent under the *res gestae* rule.

A court should never withdraw a question from the jury unless all reasonable men in the honest exercise of a fair and impartial judgment would draw the same conclusion from the facts which condition the issue. *Courtney v. Ocean Accident & Guaranty Corporation*, 346 Mo. 703, 142 S. W. (2d) 858; but it is well settled that verdicts may not be based on conjecture and speculation. *Hamilton v. St. Louis-San Francisco Ry. Co.*, 318 Mo. 123, 300 S. W. 787; *Mullen v. Lowden et al.*, 344 Mo. 40, 124 S. W. (2d) 1152; *Lappin v. Prebe et al.*, 345 Mo. 68, 131 S. W. (2d) 511; *Federal Cold Storage Co. v. Pupillo*, 346 Mo. 136, 139 S. W. (2d) 996, l. c. 1001, and cases there cited. Also, it is well settled that a mere possibility of negligence is not a sufficient foundation for an inference of negligence which will justify submission of a case to a jury. *Mullen v. Lowden et al.*, *supra* (124 S. W. (2d) l. c. 1156).

With the hearsay eliminated, we think that all reasonable minds would agree that it would be mere speculation and conjecture to say that Haney was struck by the mail hook, and we are constrained to rule that plaintiff failed to make a submissible case on that question. And we also rule that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney. It will not be necessary to rule other questions. The judgment should be reversed, and it is so ordered.

John H. Bradley, Commissioner.

Dalton, C., concurs.

Van Osdol, C., concurs.

Per Curiam:

The foregoing opinion by Bradley, C., is adopted as the opinion of the Court. All the judges concur.

[fol. 333] And thereafter and on the 18th day of June, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E.
Haney, Deceased, Respondent,

vs.

J. M. KUEX et al., Appellants

Comes now the respondent, by attorney, and files his motion for a rehearing in the above-entitled cause or to transfer said cause to the Court en Banc, together with suggestions in support of said motion, with service shown.

Which said motion for rehearing or to transfer to Court en Banc and suggestions in support thereof are in words and figures following, to-wit:

[fol. 333] IN THE SUPREME COURT OF MISSOURI, DIVISION
No. 1

[Title omitted]

RESPONDENT'S MOTION FOR REHEARING OR TO TRANSFER TO
COURT IN BANC AND SUGGESTIONS IN SUPPORT THEREOF
Filed June 18, 1945

Comes now Walter A. Lavender, Administrator d. b. n. of the Estate of L. E. Haney, Deceased, plaintiff-respondent, and respectfully moves the Court to set aside its judgment and opinion heretofore rendered and entered reversing the judgment against appellants herein and to grant plaintiff-respondent a rehearing and reconsideration thereof or a transfer of this cause to the Court in banc, for the following reasons, to-wit:

[fol. 334] 1. Plaintiff-respondent is entitled to a rehearing and reconsideration of this cause, because this Court in deciding this cause overlooked matters which were fully submitted and which were decisive of this cause.

2. The rulings of this Court are in direct conflict with controlling decisions of this Court.

3. This opinion in holding that the statement of the Illinois Central switchman was hearsay and was not competent under the res gestae rule is erroneous and contrary to the facts developed. In arriving at this conclusion the opinion ignores all plaintiff's evidence and the reasonable inferences to be drawn therefrom, and arrives at its conclusion based entirely upon argumentative and self-serving statements by appellants, and not based on evidence.

4. The opinion of the Court is in error in holding, that with the so-called hearsay evidence as to the cause of the death of Haney eliminated, that all reasonable minds would agree that it would be mere speculation and conjecture to say that Haney was struck by the mail hook; and in ruling that plaintiff therefore failed to make a submissible case on that question. The Court ignores, in this opinion, all evidence of plaintiff and reasonable inferences to be drawn therefrom and adopts as a matter of law self-serving statements, speculation, hearsay and conjecture asserted in appellant's brief.

5. This opinion errs in reversing the judgment against appellants and in holding that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Hancy. Such holding is not based upon the evidence. It ignores plaintiff's evidence and reasonable inferences to be drawn therefrom and adopts as a matter of law assertions by appellants in their brief and is thus in direct conflict with other and prior cases from this and the Federal Courts, [fol. 335] among the latest being: *State ex rel. K. C. P. S. Co. v. Bland*, 187 S. W. 2nd 211 (Mo.), and *Mutual Ben. Health Co. v. Francis*, 148 Fed. 2nd 590 (C. C. A. Mo.).

6. In upsetting and reversing the verdict of a jury and the ruling of the trial court in refusing to grant a new trial, this opinion is attempting to weigh evidence and to deprive respondent of his right to a trial by jury. It therefore ignores many cases decided by this court in division and in banc and fails to follow the last controlling case from the United States Supreme Court in a Federal Employers' Liability case, to-wit: *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, 1 c. 411.

7. By depriving plaintiff of his right to a trial by jury this opinion violates the Federal and State Constitutions and their amendments.

8. The opinion of this Court, in depriving plaintiff of his judgment, abridges the privileges and immunities of plaintiff and deprives him of his property without due process of law, and of the equal protection of the law, and deprives him of speedy remedy in courts of justice; all in violation of the Constitutions of the United States and of the State of Missouri and their amendments.

Wherefore, plaintiff-respondent respectfully moves this Court to set aside its judgment and opinion and to grant plaintiff-respondent a rehearing and reconsideration thereof or to grant plaintiff-respondent a transfer of this cause to the Court in banc.

Respectfully submitted, N. Murry Edwards, James A. Waechter, Douglas H. Jones, Attorneys for Respondent.

[fol. 336]

SUGGESTIONS

I

Res Gestæ—Hearsay

The Commissioner's opinion holds:

"The statement of the switchman that Haney was supposed to have been struck by something protruding on the side of the train was not competent under the *res gestæ* rule" (p. 12).

This conclusion disregards respondent's evidence and relies entirely on appellants' argument as to the evidence adduced, thereby disregarding the rulings of this Court that all doubts and inferences must be resolved in respondent's favor.

The opinion states that the only evidence on this point is as follows:

"Drashman, plaintiff's witness, testified: 'He was told by an Illinois Central Switchman that Haney was supposed to have been struck by something protruding on the side of the train'" (p. 9).

On the strength of this word "supposed," the opinion reverses the finding of the jury and court, on the ground that such statement was on its face hearsay, and therefore did not come within any of the long line of authorities cited by respondent. This conclusion ignores the real evidence that the switchman actually saw the condition. It likewise ignores the fact that this witness Drashman was an employee of appellants and was an open, adversary and very hostile witness to respondent, but who, nevertheless, had to admit the following:

"* * * I heard someone say that is what happened.

Q. Did you so testify? A. Yes.

Q. And that is true, isn't it? A. Yes.

[fol. 337] By the Court: Now, do you want to explain your answer?

By the Witness: Yes, sir" (Resp. Add. Abs. 54).

Defendants would not permit their employee to explain. The witness testified again (Resp. Add. Abs. 67):

"Q. You said a moment ago that the man who made the statement that something sticking out from the

train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.

Q. That is true, isn't it? A. I think so, no one else was around there but I. C. men at that time."

Again at page 67 of the Abstract the same witness said:

"Q. You said a moment ago that the man who made the statement that something sticking out from the train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir."

The opinion concedes (p. 10) that the testimony "is of importance," and that as it was "based on hearsay" it was incompetent (p. 11), and continues that it has examined all of the many cases cited by respondent, but "find no case where it has even been contended that a statement based on hearsay, as in the present case, may be competent under the rule of *res gestae*" (p. 11), citing the *Sconce* case, 121 S. W. 2d, l. c. 781, permitting the *res gestae* exception to the general hearsay rule "where the statement is made by a person present at an accident." We submit all the proof is clear that the statement was made by the Illinois Central switchman who was "present at an accident," to the effect that:

"I heard some say that is what happened. That is true? Yes (Resp. Add. Abs. 54).

[fol. 338] "The man who made the statement, something sticking out from the train hit Haney was an Illinois Central switchman" (Resp. Add. Abs. 67).

In refusing to sustain the discretion of the trial court in admitting this evidence this court ignores and overrules its prior decisions in the following cases:

- Rosenzweig v. Wells, 308 Mo. 617, 273 S. W. 1071;
- Johnson v. Southern Railway Co., 351 Mo. 1110, 175 S. W. 2d 802;
- Redmon v. Metropolitan Street Ry. Co., 185 Mo. 1, 84 S. W. 26;

Ruschenberg v. Southern Electric R. R. Co., 161 Mo. 70, 61 S. W. 626;

Barker v. St. L. I. M. & S. Ry. Co., 126 Mo. 143, 28 S. W. 866;

Laundau v. Travelers Ins. Co., 305 Mo. 563, 267 S. W. 376;

And many other cases cited in our brief.

II

Substantial Evidence Supported Finding Haney Was Struck by the Mail Hook

The Commissioner's opinion holds (p. 12) that after the so-called hearsay is eliminated, there is mere speculation and conjecture to hold that Haney was struck by the mail hook and that plaintiff failed to make a submissible case on that question.

We submit such holding ignores all respondent's evidence and overrules and fails to follow all previous decisions of this Court in similar cases.

The evidence conclusively shows:

1) That Haney was alive and well immediately before appellants' train passed, where his duty required him to be;

[fol. 339] 2) That immediately thereafter Haney was found dead from a wound in the back of his head, which could have been caused by the swinging mail hook;

3) That there was a mail hook swinging loose from the side of the train, which could have hit Haney where he was located; and

4) That there was not a scintilla of evidence that anything else in the world could or did hit Haney except such mail rod; and

5) That no reasonable man could draw any other conclusion from the facts adduced; and

6) That a jury of 12 reasonable men so concluded; and

7) That the Trial Court sustained their finding.

Wherefore, we submit, a judge of an appellate court should not conclude that as a matter of law all other men are unreasonable, unfair and arbitrary.

A short review of the evidence, not merely appellant's contention, shows the conclusions reached by the opinion are not well founded, and have absolutely ignored all of respondent's proof.

The opinion at page 5 holds that it could be inferred that Haney could have been struck by the mail arm if he were on the mound south of the track and if the mail hook extended out as far as 12 or 14 inches. The opinion uses the following language, to-wit:

"It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches" (Op. p. 5).

But at page 10 the opinion concludes that there was no evidence that the mail hook could extend out as far as 12 or 14 inches, saying:

[fol. 340] "There was no evidence, expert or otherwise, that the condition of the track and the speed of the backup movement, and whatever curve there was, all considered together, might have caused the mail hook to swing out the 12 or 14 inches necessary to strike Haney, assuming, of course, he was standing on the mound and at a place where such swing out would reach him. Can such extension of the mail hook be reasonably inferred from the evidence of Farmer and all the other facts and circumstances? Would such an inference be based on speculation and conjecture?"

In coming to such conclusion the opinion ignores even the testimony it quotes at a previous page that there was evidence to support such finding, i.e.:

"In my experience I have seen the catcher arm swing out (with door closed) as far as a foot" (Op. p. 4).

Here is factual evidence that even with the door closed the arm swings out as far as a foot.

The opinion proceeds:

"If the door is open (and handle pulled down) the catcher arm can swing out as far as 2 feet 2 inches, to 3 feet, but they won't swing out unless somebody pulls

them up; somebody has to get hold of the handle and pull them up. They won't swing more than 12 inches without that (there was no evidence that the door was open or handle pulled down); it pivots just from the sway of the train. They won't swing any farther with the door open. I have never seen those catcher arms swing out without any force from the mail operator more than one foot from the side of the car, and that would ordinarily be going around a curve or at an excessive speed of the train so that it would rock" (Op. p. 4).

Again we have the specific evidence that even with the door closed, "in going around a curve * * * the arm [fol. 341] pivots just from the swing of the train" not "more than 12 inches."

The opinion comments here that there is no proof that the door was open. Likewise there is no proof it was closed, but that it is usually open in coming into a station. The train was in appellant's exclusive control. Absent any evidence to the contrary, the inference is that it was open.

There is ample evidence that the train was backing around a curve.

The opinion (p. 5) quotes Engineer Mee as testifying that:

"I couldn't see the back end of the train from my position in the cab because of a curve. * * * I could see nothing of the rear end. It was on the curve and out of sight."

Now, the opinion does hold that (Op. p. 5):

"It could be inferred from the facts that Haney could have been struck by the mail hook if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches."

Therefore, it is plain even from the evidence quoted above that the last half of this formula was properly developed, i.e., that "the mail hook extended out as far as 12 or 14 inches."

Despite this undisputed evidence that the hook did extend 12 or 14 inches, the opinion continues to assert (Op.

p. 6) that there was no evidence that the mail hook extended out 12 inches, because after the accident, when the train was not in motion, or going around a curve, "nothing was found extending out from the sides." But there was no evidence that it was not extending out when it struck and killed Haney. Not a railroad witness testified that he examined the hook and that there was no blood or [fol. 342] hair on same. Such failure to testify certainly raises an unfavorable inference. The train was in the control of appellants.

The doctor who made the post mortem testified that the injury causing death was

"Caused by a fast-moving small round object" (Resp. Add. Abs. 94-96)

which could have been

"A rod or something projecting out from a train that was going 8 or 10 miles an hour."

Other witnesses testified to the same effect that the grab iron could have extended out far enough to strike Mr. Haney.

Witness Drashman testified (Resp. Addl. Abs. p. 81):

"Q. Can that be extended out to the side of the train? A. Yes.

Q. How far out to the side of the train can that mail hook be extended? A. You can wing it out three feet.

Q. Swing out three feet? A. To the tip end of the hook."

Witness Gates testified on cross-examination by Mr. Skinker (Resp. Addl. Abs. p. 18):

"Q. The overhang of an ordinary passenger train is, roughly, two to two and a half feet, isn't it, somewhere in that neighborhood, the overhang of the train? A. Yes, sir.

Mr. Edwards: You mean to the side of the rail?

Mr. Skinker: Yes.

Q. (By Mr. Skinker) It extends beyond the rail? A. Yes, it would be about, I guess, twenty-four to thirty inches.

Q. Twenty-four to thirty inches? A. Yes."

[fol. 343] The opinion (page 3) seems concerned with the measurements of Haney and whether the hook could have struck him in the head where it did.

We find that while the opinion is in error in stating the figures, by reason of one slight omission of seven inches, it nevertheless seems to concede that under those circumstances the grab hook could have hit Haney where the wound was found as the opinion says that "However as we understand the mail hook ascends as it extends out." This concession undoubtedly takes care of the seven inches eliminated in the court's figures, but for accuracy's sake we call attention to the fact that where the opinion states, when the arm is down it is 6 feet 8 inches above the top of the rail which is 7 inches high and that while the ties were imbedded level with the ground, the knob at rest was 6 feet 8 inches above the ground or 4 feet 8 inches above the top of the mound. This of course is inaccurate as in figuring the 6 feet 8 inches above the ground the court has overlooked the fact that this 6 feet 8 inches was figured above the rail which was 7 inches above the ground, therefore, this figure would properly be 87 inches above the ground or 5 feet 2 inches above the top of the two foot mound instead of 4 feet 8 inches. Therefore, with these figures carried out accurately, the place where the rod struck Haney in the back of the head figures out mathematically to within an inch to the exact place where he was actually struck in the back of the head which was 3 or 4 inches below the top of Haney's head (Resp. Addl. Abs. p. 79, pp 109-113 and 59).

The opinion states that the evidence shows that Haney's body was lying six feet north of the north rail of the Frisco track, but fails to state that witness Bundy estimated the distance between five and five and one-half feet.

Witness Bundy testified on cross-examination by Mr. Skinker (Resp. Addl. Abs. p. 28):

[fol. 344] "Q. How far was his head north of the north rail of the track? A. I would say about five feet, five foot and a half."

The opinion likewise ignores other evidence which shows plainly and definitely that the wound on Haney's head was made by an instrument such as the mail grab iron of the passing train and that it was a long narrow wound across the base of the back of the head in a slanting position, as would be caused by the rod moving upwards and striking from left to right as the train passed him. In other words, a glancing blow from the lower to a higher position, and ranging from left to right.

Witness Gates testified (App. Abs. p. 29):

"In speaking of Mr. Haney's cap, I observed the dark spot on the back of it. As well as I can recall, it was about half an inch wide, or maybe a little wider, and about an inch and a half long. It looked like it might have been at a place about the center of the head, a little to the right and a little below the center of the head, but I would say above the ear. I think it was where something struck it, just what it was I couldn't say, but it was something that came in contact there, in my opinion. The mark was on the outside of the cap and in the back."

In describing the mark on the outside of the back of Mr. Haney's cap, Witness Gates testified (Resp. Addl. Abs. p. 19):

"A. Well, it—it's where I think something struck it; just what and where and how I couldn't say, just what it was; but it was something come in contact there, in my opinion.

Q. And it left those dark marks on the cap that you describe? A. Yes, sir."

Again (Resp. Addl. Abs. p. 16):

"Q. No blood on the inside? A. No, sir, no blood stains, but just a black spot. And I was told later [fol. 345] that that corresponded with the location of the injury on his head.

Q. On the back of his head? A. Yes, sir."

Witness Gates again testified (Resp. Addl. Abs. p. 17):

"Q. Could you describe a little better this cap, this black spot on the cap, how large it was? A. It was

about the width of my finger and possibly an inch and a half long.

Q. About the width of your finger, and your finger is about a half inch thick, isn't it? A. Possibly so.

Q. And about two inches long? A. An inch and a half, something like that.

Q. About an inch and half long? A. Yes.

Q. And did that run horizontal across the cap? A. I don't recall now just the exact manner, but it seemed like there was bars across down this way, that it struck not across, but kind of at an angle, downward like."

Under such circumstances the holding of this opinion is squarely in conflict with previous decisions of this Court holding that such evidence is amply sufficient to support a plaintiff's verdict, in the cases of:

In *Whittle v. Thompson* (Mo.), 179 S. W. 2d 22, a mere licensee was struck by an unfastened swinging door of a refrigerator car in a passing train while plaintiff was walking along a path near railroad.

In *Evans v. Missouri Pac. R. Co.*, 342 Mo. 420, 116 S. W. 2d 8, l. c. 9, 10, this court says:

"Under the rule above stated, we think this makes a *prima facie* case for the respondent, as under the circumstances an inference of fact arises showing negligence."

In *Noce v. St. Louis-San Francisco Ry. Co.*, 337 Mo. 689, 85 S. W. 2d 637, l. c. 639, this Court says:

"The essential conditions of a *res ipsa* case are present. The facts shown make out a case coming [fol. 346] within the category of falling objects and similar occurrences, such as objects protruding from passing trains or cars, to which the *res ipsa* rule has been generally applied."

In *Hicks v. Mo. Pac. R. R. Co.*, 64 Mo. 430, this court upheld a verdict where:

"A piece of timber with which one of the cars was loaded, projecting over the side of the car from

twenty inches to two feet, struck plaintiff and broke his nose and otherwise injured him" (l. c. 432).

And the many other cases cited in our brief.

This opinion is in direct conflict with the late decision of the United States Supreme Court in a federal railway employers case of *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, where Mr. Justice Murphy, in speaking of the requirement that a verdict must be sustained, says:

"If that requirement is met as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the twelve jurors" (l. c. 411).

In reversing the lower court for adopting appellant's theories instead of those most favorable to the respondent, the court continues (l. c. 412):

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that uncertain inferences. The focal point of judicial review the proof gives equal support to inconsistent and view is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, [fol. 347] and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co. v. McDade*, 135 U. S. 554, 571, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235; *Tiller v. Atlantic Coast Line R. Co.*, supra, 318 U. S. 68, 63 S. Ct. 451, 143, A. L. R. 967; *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions

or because judges feel that other results are more reasonable."

To the same effect is *Brady v. Southern Ry Co.*, 320 U. S. 476, 64 S. Ct. 232, a federal employers' liability case, where Mr. Justice Black, at page 237, says:

"Twelve North Carolina citizens who heard many witnesses and saw many exhibits found on their oaths that the railroad's employees were negligent. The local trial judge sustained their finding. Four members of this Court agree with the local trial judge that the jury's conclusion was reasonable. Nevertheless five members of the Court purport to weigh all the evidence offered by both parties to the suit, and hold the conclusion was unreasonable. Truly, appellate review of jury verdicts by application of a supposed norm of reasonableness gives rise to puzzling results."

This dissent was concurred in by Justice Douglas, Murphy and Rutledge.

We submit the same situation exists here.

The next finding of the opinion as to lack of evidence is as to (Op. p. 6) "was there any substantial evidence [fol. 348] that Haney, when struck, was standing at a point or place, on the mound where he could have been struck by the mail hook extended as the mail car passed the switch and mound?"

The evidence shows that it was Haney's duty to be at the switch where he was killed.

Witness Brusco testified (Resp. Addl. Abs. p. 117):

"Q. His duty to open the switch and remain there until the train backed in, and then go back to his shanty? A. Yes, sir.

Q. That is the custom, isn't it? A. Yes, sir."

Witness Arnold testified (Resp. Addl. Abs. p. 31):

"Q. You would give such a signal after you have thrown the switch and opened it? A. Yes, sir.

Q. Then what would you next do? A. Well, you would just stand there and wait until the train got back.

Q. Backed up, you mean? A. Yes, sir.

Q. And when the train backed up then next what would you do? A. Close the switch."

As to Being South of the Track

The opinion at page 2 states that defendant's rule 104 required Haney to cross to the south side of the track and that the Frisco conductor testified he saw Haney cross to the south side of the track after he lined the switch, and the last he saw of him, he was standing south of the track. We fail to see what importance the Commissioner attaches to this so-called presumption which vanished on the appearance of factual testimony to the contrary. The conductor's testimony as to the statement of whether Haney was north or south of the track before the train started to back into the station vanished when his testimony is read in connection with his admission that he remembered very little about the affair and didn't remember Haney [fol. 349] going to the south of track. Mrs. Haney testified, page 159 of the Abstract, to the effect that the conductor had told her:

"He said his memory wasn't so good. He said he didn't remember anything about my husband going to the south side of the track; he didn't know where he was standing or anything about it; and he couldn't remember; he didn't see him afterwards."

Referring to the next line of the opinion to the effect that Haney's duty required him to be under Rule 104 on the south side of the track, we find this so-called presumption likewise vanishes into thin air in view of appellants' own witness Brusco, where he testified that Haney's duty was to remain at the switch on the north side of the track, and that that was the custom and practice.

He testified in Respondent's Additional Abstract, page 117, as follows:

"Q. Haney's next duty, after that train backed in there, was to close that switch, wasn't it? A. Yes, sir; to close that switch and go back to his shanty.

Q. And he should have done that after the train backed in there, immediately after the train cleared the switch? A. Yes, sir.

Q. That was a custom for him to do that? A. Yes, sir; that was his duty.

Q. His duty to open the switch and remain there until the train backed in, and then go back to his shanty? A. Yes, sir.

Q. That is the custom, isn't it? A. Yes, sir."

To the same effect is the testimony of witness Arnold, appearing at page 31 of Respondent's Additional Abstract, as follows:

"Q. And then after giving such a signal to back up—that is a signal to back up you are talking about? A. Yes, sir.

[fol. 350] Q. You would give such a signal after you have thrown the switch and opened it? A. Yes, sir.

Q. Then what would you next do? A. Well, you would just stand there and wait until the train got back.

Q. Backed up, you mean? A. Yes, sir.

Q. And when the train backed up then next what would you do? A. Close the switch."

As to Haney's Body Lying at Right Angles To the Track

The opinion herein concludes that Haney could not have been struck by the mail arm projecting from the train because his body was found "lying at right angles to the track with his head toward the track and his feet extending back north" (Op. p. 10). We submit that this conclusion is not based on fact. The evidence is, and the opinion concedes, that the point where Haney's body was found, being the same point where he was required to be pursuant to his duty, was on the inside of a curve, and the testimony of the various witnesses from which the Commissioner draws his conclusion must be explained with reference to which part of the curve in the track each witness referred. It must be recalled that the main line of the Frisco Company was exactly east and west; that the switch of the Illinois Central entering into their depot was practically north and south. Haney was stationed at the beginning of the curve. When a witness testified that his head was to a track, did he mean the track running east and west,

or did he mean the track running north and south? If the witness described the body as lying approximately east and west, if he were referring to the main track, the body would have been exactly parallel to the main track, but would have been at right angles to the Illinois Central switch track. If, on the other hand, he had described [fol. 351] the body as lying with his head south, and his feet north, then the body would have been parallel to the I. C. switch track, but at right angles to the Frisco main line.

It is piling conjecture upon conjecture for this opinion to say that the twelve jurors and the trial court did not reconcile these differences and apply them to the facts at bar, and it is more logical to believe that they were not acting in an arbitrary and unfair manner when they decided that there was no law of physics which would preclude a man's body from being thrown or falling in any particular manner when he was struck a slanting upward blow across the back of the head and jerked off his feet by the mail grab hook of a swiftly moving train, and thrown almost lifeless to the ground. How can this Court now take a slide-rule and figure exactly how and in what manner the body of a man would fall under such circumstances and deprive that man's dependents of a recovery granted them under the Federal law and by twelve jurors and a trial judge, and say that such people were not reasonable men?

We submit likewise that there is no testimony in the case upon which such conclusion can be based. The actual testimony is to the contrary, to wit:

Witness Bundy, at page 25 of Respondent's Additional Abstract, testified that Haney's head was pointing to the southeast, testifying in the following language:

"Q. His head was pointing, as you say, southeast?

A. Yes, sir.

Q. And this train, Frisco train, had just backed east and turned north? A. Yes, sir.

Q. Into the station? A. Yes, sir."

This would certainly prove that the body of Haney was lying parallel to the track and not at right angles.

Witness Drashman testified Haney's head was toward the west, but that he could have been facing east, saying as follows (Abs. p. 71):

[fol. 352] "I believe the head was toward the west and he was lying on his face with his back up if I remember right, but I am not sure, because I didn't pay that much attention to it. He could have been facing east."

Whereas in Respondent's Additional Abstract, page 76, he testified that Haney's body was about six feet from the Frisco Company track, that is the main east and west track and that the body was lying parallel to the track, and that he thought Haney's head was to the west but he was not quite sure of that fact, testifying, as follows:

"Q. Well, did you see Haney's body down there?

A. Yes.

Q. And how far was it from the Frisco switch, from the main line? A. I don't know, I didn't measure it.

Q. Well, how far was it from the Frisco tracks?

A. I did not measure that.

Q. What would be your best judgment? A. About six feet.

Q. About six feet. Do you refer to the body or the head or what part of Haney's body would you refer to?

A. Well, I think the whole body.

Q. The whole body. And which way was Haney's head pointing when you first saw it? A. I believe it was west.

Q. Pointed west. And was he lying on his back or on his face or side or how? A. On his face, if I remember right.

Q. Lying on his face? A. Yes.

Q. With his back up? A. Yes.

Q. And you think his head was faced west? A. Yes.

Q. Are you sure about that? A. No, I am not sure. I think it was.

Q. Well, I just want to know if you are reasonably sure. A. No, I am not sure, because I didn't pay that much attention to it.

Q. He might have faced east then? A. Yes, he could have been."

[fol. 353] The opinion states that the evidence shows that Haney was dragged toward the track. This was error.

Witness Bundy testified (App. Abs. p. 34):

"There was no evidence of Mr. Haney having been dragged on the ground. I had a good bright electric lantern."

The opinion attempts to give appellants' witness Bruso's version of the matter as to tracks and distances found by witness the day following the accident.

Witness Bruso testified (App. Abs. p. 113):

"I didn't make any mark the night before that where I found Haney, because I was never back there any more after I found him. I was there only just a few minutes that night, when I found his body, not any more than 3 or 4 minutes or 5 anyhow, and it was dark around there. I did not see the tracks that night, but I saw them the next morning."

This is very direct and positive evidence by Appellant's witness who was adverse and hostile to plaintiff-respondent, to the effect that Haney's body was parallel to the main track and not at right angles as concluded by the opinion.

Witness Bundy, at page 27 of Respondent's Additional Abstract, testified that he turned Haney's body over to the north and around to the north and east with the head to the north. This manipulation of Haney's body shows that the body had been changed by Bundy so that after others came up, the body might have been at right angles to the main track but parallel to the Illinois Central switch track, but that the testimony of those who saw the body later would not have been based upon the original condition of the body. It likewise shows that the body may have been dragged or scuffed along the ground by these witnesses [fol. 354] themselves and therefore, the dragging marks seen by other witnesses may or may not have been made by Haney being dragged over the ground by the mail arm. Certainly no other assumption is tenable unless we follow into the realms of fancy suggested by appellant's counsel, to the effect that possibly some robbers may have knocked him down and then for some unforeseen reason have tried

to wait until they could be discovered and took up the time, while waiting, by dragging the body along the ground and at the same time, leaving the watch, ring and money in Haney's pocket. This testimony is set out at page 27, as follows:

"Q. When you turned him did you just turn him over or carry him some distance? A. We turned him over to the left.

Q. Turned him over to the north? A. And turned him around.

Q. To the north and east? A. Yes, sir.

Q. And you say you turned him around? A. Yes, sir.

Q. And how did you turn him, which direction did you turn his head? A. North.

Q. Turned his head more to the north? A. Yes, sir.

Q. Did you turn him so that his head was pointing more north than east? A. I believe it was; yes, sir."

Again at page 34 Bundy stated that "there was no evidence of Mr. Haney having been dragged on the ground. I had a good bright electric lantern."

At Abstract, page 36, witness Arnold testified: "I think Haney's body was about straight north of the Frisco switch." Bundy testified to the same effect (Abs. p. 28):

"Q. How far was his head north of the north rail of the track? A. I would say about five feet, five-foot and a half."

[fol. 355] We, therefore, submit that there is no evidence to justify the Court's conclusion that the body was at right angles to the track, and so could not have been struck by a grab iron extending from the side of the mail car.

AS TO THE POCKET BOOK

The opinion states at pages 9 and 10 that Haney's pocket book was found six days after his death, about a block away, but contained no money and that it was not soiled.

This evidence was evidently offered by appellants to in some way justify their unsupported theory that possibly Haney had been murdered, that the robbers had taken the pocket book, taken the \$10.00 out of it and dropped it a

block away from the scene of the accident. However, they do not explain why these hypothetical robbers left Haney's watch and ring on his body and kept the pocket book for a week before dropping it, about a block from the accident where it had not been in the rain or snow and it was not even soiled. The opinion does state, at page 10, that it was found near where Haney was placed in the ambulance. We believe the best inference to be drawn therefrom would be that the pocket book had not been taken from Haney but had fallen from his pocket when he was placed in the ambulance, picked up and put on a brace where it was found by witness Scott and a colored man on a fence protected by a roof overhead (App. Abs. 138). It certainly does not support the theory of robbery.

Evidence on this point is as follows:

Witness Bundy testified (App. Abs. p. 34):

"They carried him on a stretcher of some kind from the point where I was holding him out to Florida Street to the ambulance. I noticed he had his watch on. It was a gold watch, was intact and was in the watch [fol. 356] pocket in his pants. I did not look for any ring or for his pocket book, and don't know whether he had them or not. When he was taken away, I went back to my crew."

III

PLACE OF WORK WAS UNSAFE

The opinion (p. 12) in 3 lines, without any explanation of the issues, the law, or the facts, holds that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney. It thus ignores completely the liability of defendant Illinois Central to furnish its employee a safe place to work.

Plaintiff's 3rd Amended Petition charged defendant Illinois Central failed to furnish its employee a safe place to work, in that (Abs. p. 5):

"Plaintiff further states that defendant Illinois Central Railroad Company was guilty of negligence which caused or contributed to cause the injury and death of

said Lyman Elmer Haney, in the following respects, to-wit:

"1. In negligently failing and refusing to furnish Lyman Elmer Haney with a reasonably safe place in which to work and perform the duties assigned to him and which he was required to do, in that the ground was high and uneven near said switch and the light was insufficient and inadequate and the backing train had some object, rod or stick projecting or swinging out to the side near said switch.

"2. In negligently failing and refusing to furnish and provide said Lyman Elmer Haney with reasonably sufficient light at the place where he was required to work so that said Lyman Elmer Haney could see and could be seen and thereby be reasonably safe in doing the work required of him to be done by defendants.

[fol. 357] "3. In negligently failing and refusing to furnish and provide said Lyman Elmer Haney with proper and safe equipment to do the work required of him to be done, as alleged and set out in assignments of negligence numbers 1 and 2 herein.

"4. In negligently furnishing and providing a place for said Lyman Elmer Haney to work which was unsafe and dangerous as described and set out in assignments of negligence numbers 1, 2 and 3 herein."

In arriving at the conclusion that it was safe for Haney to work in the dark and walk over high and uneven mounds of cinders, the opinion ignores the evidence that it was so dark the Engineer could not see Haney.

The evidence as to lack of light is as follows:

Witness Mee testified in Respondent's Additional Abstract, page 123:

"Q. Could you tell me how far you could see a rod, say it was two and a half inches in diameter? A. How far I could see a rod—how far away?

Q. Yes, how far at that switch, with conditions the way the light was the night Mr. Haney was killed?
A. I couldn't say; I don't know.

Q. Do you think you could see an object such as I have described as far as fifty feet away? A. I don't believe I could."

Alvin Haney testified on behalf of plaintiff that he was at the switch where his father was killed soon afterwards and it was so dark he could not see a 3-inch pipe 25 feet away (Resp. Addl. Abs. p. 129):

/ "Q. When you were there near that switch on that occasion, would you say whether or not you could see a thing as large as a three-inch pipe twenty-five feet away? A. No, sir, it was too dark.

Q. You couldn't? A. No.

Q. Of course, a one-inch pipe you couldn't see as well as a three-inch? A. No, sir."

[fol. 358] And again, at page 130 of Respondent's Additional Abstract:

"By Mr. Edwards: Three and a half or four inches in diameter, that switch stand, I will ask you if you could see underneath this green light, the stand part, when you were within twenty-five feet of it that night? A. No, I couldn't."

Witness Creagh, defendant's conductor, testified (App. Abs. p. 144):

"The first time I saw Haney he was, I suppose, about ten feet from me. I could not see how he was dressed, as there was no artificial light around there. I could not see whether he had any badge on his cap or coat when he was 20 feet away from me. * * * I couldn't see whether Haney was wearing a hat or a cap because I didn't pay any attention to what he had on his head nor did I see whether he had any pistol on him."

Witness Bruso testified (App. Abs. p. 121):

"The red light on the switch designates the switch stand, but I could not see the stand until I got about 20 or 30 feet from it, and I could see the form of the body there. I did not know at that time who it was until I got up there."

Witness Drashman testified (Resp. Addl. Abs. p. 79):

“Q. Is there a mound north of the Frisco tracks there at the switch? A. Well, there may be what you call a mound; there is a pile of dirt piled up there.

Q. And where is this pile of dirt with reference to the switch, which way from it? A. I don't know.

Q. Is it north or south? A. I don't know, I don't know just where that switch is, I didn't pay any attention to it.

Q. Do you know how high that mound of dirt is? A. Well, I imagine about two feet above the rail.

[fol. 359] Q. About two feet above the rail. And about how long does that extend along there? A. Oh, several feet.

Q. Does it extend east and west of the switch? A. Both east and west of the tracks, yes.”

Witness Alvin Haney testified (Resp. Addl. Abs. pp. 110-111):

“Q. What was the condition, tell the jury, of the ground, the height of the ground where you saw this blood, with reference to the north rail, was it higher than or lower than the north rail of the Frisco tracks? A. It was higher.

Q. And how much higher was that than the north rail of the Frisco tracks, where the blood was? A. Well, to the best of my knowledge, I would say it was around eighteen or two foot—eighteen inches, or two foot, something like that.

Q. Was this ground north of the tracks, was that grass or of what material was it? A. Cinders.

Q. Cinders, or what? A. Cinders.

Q. Now, was there another railroad track on north of this Frisco track? A. Yes, sir.

Q. And about how far, or what is the distance between the two tracks? A. Well, I really couldn't say for sure, but I would say it was around fifteen foot between the two, as far as I know.

Q. And did this space between this Frisco track, the north rail, and this south rail of this railroad track north of it, did that height along there vary in different places? A. Yes, sir.

Q. It did? A. Yes, sir.

Q. And some places it was higher than at other places? A. Yes, sir."

Witness Brusco testified (Resp. Addl. Abs. p. 117):

"Q. Now, north of this Frisco track it is uneven, isn't it, there is cinders there? A. Well, there is cinders on all cinder tracks.

[fol. 360] Q. I say, there is cinders on the north of the Frisco track, isn't there? A. There is what they call the cleanings, just been thrown back away from the track there. I suppose that little pile along there, that little pile about eighteen inches, a rough guess.

Q. About eighteen inches above the rail, isn't it, those cinders? A. Yes, sir."

It is thus shown that it was so dark that neither witness Alvin Haney nor appellant's witness Mee could have seen a three-inch pipe 25 or 50 feet distant. Defendant's witness Creagh, the conductor, could not see how Haney was dressed 10 feet away.

Defendant's engineer Mee further admitted that he did not see Haney as his train backed past the place where Haney was or had been waiting for the backing of the train, because the witness was looking towards the back of his train and did not look down toward the ground and would not have seen Haney had he either been lying or standing at the place where he was struck.

He testified at page 119 of Respondent's Additional Abstract as follows:

"Q. Did you look down at the ground on that occasion? A. No, I was watching the movement of the train; I never looked down at the ground; I looked back.

Q. You don't mean to say you know Mr. Haney wasn't lying at that switch when you passed it? A. No, I didn't say that; I don't know nothing about it; I said I didn't see him there."

Again at page 119:

"Q. What I mean is, don't you recall testifying that if Mr. Haney had been knocked down on the ground there, you would likely not have seen him? A. That is a fact.

Q. That is true? A. Yes, I would likely not have seen him."

[fol. 361] Plaintiff pleaded in his petition a separate and distinct cause of action against appellant, Illinois Central Railroad Company, alleging, among other things, as shown hereinabove, that the place where Haney was required to work was unsafe and dangerous because the ground was high and uneven and there was inadequate light.

Plaintiff's case was submitted to the jury as against the defendant Illinois Central Railroad Company under plaintiff's instruction No. 4 (App. Abs. pp. 166-168). It will be noted that instruction No. 4 did not require the jury to find that Haney was struck by a mail hook or any object extending or swinging out beyond the side of the train. This, of course, was not a necessary element for the jury to find in order to find that the place was unsafe and dangerous. The Illinois Central Railroad makes no complaint against plaintiff's instruction No. 4 because that instruction gave a correct definition of the law and was not erroneous.

This instruction shows the theory upon which plaintiff tried his case as against the Illinois Central Railroad Company. He was entitled to try his case on the same theory in this Court on appeal as he had tried it in the lower court.

This court in its opinion has not given plaintiff a full and fair hearing and decision as to his case against the Illinois Central Railroad. This court should have stated the issues between this plaintiff, the respondent, and the Illinois Central Railroad Company, one of the appellants. It should then have made a fair and honest finding of the facts of the plaintiff's case against the Illinois Central Railroad Company and the opinion should have made a finding and statement of the law as to the facts and issues against the Illinois Central Railroad Company.

This opinion does not make a finding on the issues, evidence and law as to the Illinois Central Railroad.

[fol. 362] The case is ordered reversed as to the Illinois Central Railroad Company in the opinion by a short cryptic conclusion and statement to the effect:

"And we also rule that there was no substantial evidence that the uneven ground and insufficient light

were causes or contributing causes of the death of Haney."

Plaintiff has not had his day in court as against appellant Illinois Central Railroad.

The only thing necessary to be established by the evidence under the Interstate Commerce Laws was that the negligence of the Illinois Central Railroad Company in failing to furnish Haney with a safe place to work in whole or in part caused his death.

How can this court say that the negligence of the Illinois Central Railroad Company in failing to furnish sufficient light (a safe place to work) did not, as a matter of law, in part cause his death?

Plaintiff's instruction No. 4 told the jury that it was the duty of the Illinois Central Railroad to exercise ordinary care to furnish Haney with a reasonably safe place to work and to keep and maintain the place where Haney was required to work reasonably safe. One of the elements required by instruction No. 4 to be found was that the ground was high and uneven and that the light was inadequate. It would have been sufficient for this instruction to have required the jury only to have found that the light was inadequate in order for the place to be unsafe and dangerous. It has been so held by this court and the Court of Appeals that the insufficiency of light is sufficient to establish an unsafe place to work.

The one sentence on the last page of the opinion which holds that plaintiff was not entitled to go to the jury as against the Illinois Central Railroad without naming that appellant was not a decision as is contemplated by Chap- [fol. 363] ter 2, Title 45, U. S. Code, Section 51, and under the provisions of the Constitution of the State of Missouri. We submit that this Court erred in reversing the judgment as to appellant Illinois Central Railroad without giving its reasons in a written opinion on the issues, facts and law.

A master's duty and liability in respect to furnishing sufficient light for his servant is governed by the general rule applicable to furnishing of safe place to work, that is, master must exercise reasonable care and skill so that place to work shall be reasonably safe.

King v. City of St. Louis, 155 S. W. 2d 557, l. c. 561:

"We do not believe that the principles announced in the above cases require us to hold as a matter of law

that defendant in the case at bar was free from negligence. The duty and liability of the master in respect to furnishing sufficient light for his servant is governed by the general rule applicable to the furnishing of a safe place to work, that is, the master must exercise reasonable care and skill to the end that the place in which he requires his servant to work shall be reasonably safe. 39 C. J. 350. In determining whether the master has fulfilled his duty in this respect in any particular case, it is a firmly established rule of law that such question must be left to the determination of the jury where the circumstances and surroundings of the case are such that reasonable minds might differ on the question."

In action by circus employee for injuries sustained in removing equipment on account of falling into hole caused by removal of tent stake, evidence of employer's negligence in failing to provide and maintain sufficient lights held for jury.

Reynolds v. Al. G. Barnes Amusement Co. (Mo. App.), 300 S. W. 1062, 1 c. 1063:

"It was defendant's duty, under the circumstances in evidence, to use reasonable care to see that the [fol. 364] lights in question were so placed as to render plaintiff's place of labor reasonably safe, and a failure so to do was negligence. The fact that the omission may have occurred through the fault of its servants and agents charged with said duty will not release defendant from liability. And this observation applies as well to the question of filling and tamping the stake hole as to the failure to furnish sufficient light. *Lampe v. Am. Ry. Exp. Co.* (Mo. App.), 266 S. W. 1009, and cases therein cited.

"In our prior opinion we held that although a petition alleges several specific acts of negligence, it is not necessary to prove all of them, but at least one, sufficient to cause the injury, must be proved. *Meeker v. Union Electric Co.*, 279 Mo. 574, 216 S. W. 923. However, there was evidence to sustain both of the above-mentioned charges, and the jury well could say that they combined to help bring about the injury. Under these circumstances, the case was properly sent to the jury, and there was no error in refusing to give

the instruction in the nature of demurrers to the evidence. We find no reversible error of record.

"The judgment is affirmed."

This case was affirmed by the Supreme Court of Missouri in Bane in the case of *State v. Trimble*, 300 S. W. 1064.

In the *Reynolds* case quoted from above, it was held that the failure to fill the stake holes on the circus grounds was sufficient to show an unsafe place to work and the failure to furnish light was another ground of failing to furnish a safe place to work.

The Court held that the case should have been submitted to the jury on both grounds, but that there was sufficient evidence to support a verdict on either one of the grounds.

We have the same situation in the case at bar. There was sufficient evidence to show that the place was unsafe because of inadequate light.—There was also sufficient [fol. 365] evidence to show that the place was unsafe because the ground was high and uneven.

Plaintiff's instruction No. 4 required the jury to find both that the ground was high and uneven and that the light was inadequate in order to find that the place was unsafe and dangerous.

Although there was no evidence that Haney was murdered the opinion indicates the circumstances point to this conclusion and the opinion fails to state that there was no evidence of any struggle or any weapon used to murder Haney.

Witness Bundy testified (App. Abs. p. 32):

"I did not see any club or pipe or weapon of any kind. I saw a pistol lying under Haney's body. * * *

His clothing showed nothing to indicate a struggle."

Witness Bruso testified on behalf of defendants (App. Abs. p. 114):

"I saw no evidence of any struggle, and I saw no pipes or clubs or anything around where I saw Haney's body."

Even though there had been some scintilla of proof that Haney had been killed by robbers (which is specifically denied), defendants would still be liable, if the place was dark and unsafe, under the doctrine laid down in the case hereinafter set out.

Yard conductor's complaint for injuries sustained when he unintentionally surprised and was shot by gang engaged in car breaking and robbery in railroad yard, alleging that railroad "knowingly" maintained conditions in railroad yard, tempting thieves, robbers, and desperadoes to resort thereto for looting, robbery, car-breaking, etc., and making yard an unsafe place for railroad employes to work in, and that railroad with knowledge of such [fol. 366] conditions failed to remedy them, held sufficient to state cause of action as against contention that unlawful acts of the criminals was intervening cause.

Green v. Atlanta & C. Air Line Ry. Co. (Sup. Ct. of So. Carolina), 126 S. E. 441, 1. c. 444:

"But, where it appears that the master has actual knowledge of conditions within his control which conduce to expose a servant in the performance of the master's work to danger from the lawless acts of third persons, and that the intervention of such illegal acts of third persons is a consequence reasonably to be expected from the maintenance of such conditions, a different case is presented. In the case at bar it is alleged that the conditions rendering the servant's place of work unsafe were 'knowingly' maintained; that defendants had actual notice of the danger from the intervention of the lawless acts of third persons; and that the unsafety of the place of work from that source was recognized by the defendants as a condition calling for remedial action. Proof of that state of facts would, we think, clearly warrant the inference that the lawless act of the third persons which resulted in injury to the servant was a consequence within the actual contemplation of the defendants and was not such a consequence as could not reasonably be expected to follow in natural and ordinary sequence from the original act or omission upon which the actionable negligence is predicated. If the intervention of the lawless acts of third persons was by virtue of the defendants' knowledge of the situation, a consequence reasonably to be expected, it was not a consequence too remote to entail liability, for 'that which is reasonably to be expected will be regarded as both proximate and natural, although it may be considerably removed.' *Harrison v. Berkley*, 1 Strob. 525,

549 (47 Am. Dec. 578). In that state of the facts there remains no tenable basis for a conclusion that, merely because the act which results in, or concurs as an efficient cause in producing, the injury was [fol. 367] illegal in character, and was an act for which independent third persons were also liable as tortfeasors, the alleged negligence of the defendants was thereby insulated, and the causal connection broken. If the intervention is reasonably to be expected, and hence is to be regarded as a natural and proximate consequence, the fact that it consists in wrongful misconduct for which third persons might also be held legally responsible furnishes no sound reason, as we apprehend, for declining to apply the logical and well-established doctrine that an intervening cause, brought to bear by an independent, responsible human agency, will not break the causal connection, if such intervening cause was induced, produced, or set in motion by the negligence charged to the original wrongdoer. 22 R. C. L. 134, Section 19; *Foster v. Union*, *supra*.

"In the view indicated, the demurrer to the complaint was properly overruled."

We respectfully ask this Honorable Court to grant Respondent a rehearing or to transfer this cause to the Court in banc.

Respectfully submitted, N. Murry Edwards, James A. Waechter, Douglas H. Jones, Attorneys for Respondent.

[fol. 369] And thereafter and on the 2nd day of July, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E. Haney, Deceased, Respondent,

vs.

J. M. KURN et al., Appellants

Now at this day the Court having seen and fully considered the motion of the respondent for a rehearing in the above-entitled cause or to transfer said cause to the Court en Banc, doth order that said motion be, and the same is hereby overruled.

And thereafter and on the 17th day of July, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E. Haney, Deceased, Respondent,

vs.

J. M. KURN et al., Appellants

Comes now the respondent, by attorney, and after obtaining leave of Court files motion for leave to file a motion to modify the opinion in the above-entitled cause, with service shown.

Which said motion for leave to file motion to modify the opinion in said cause is in words and figures following, to-wit:

[fol. 370] IN THE SUPREME COURT OF MISSOURI, DIVISION
No. 1, MAY TERM, 1945

No. 39174

WALTER A. LAVENDER, Administrator de Bonis Non of the
Estate of L. E. Haney, Deceased, Respondent.

vs.

J. M. KURN et al., Trustees of St. Louis-San Francisco Rail-
way Company, Debtor, and Illinois Central Railroad Com-
pany, Appellants

MOTION OF RESPONDENT FOR LEAVE TO FILE MOTION TO MODIFY
OPINION

Comes now respondent in the above entitled cause and moves the Court to grant him leave to file respondent's motion to modify opinion in the above entitled cause and for grounds of this motion, respondent states:

The present rules of this Court are silent as to the time allowed for filing a motion to modify an opinion that before the last amendment was made in the rules of this Court, the rules provided and it was a custom to file a motion to modify an opinion after motion for re-hearing and to transfer to Court In Banc had been passed upon by the Court.

Respondent further states that its Counsel assumed that the old rules and custom was still in force and that they could file a motion to modify after the over-ruling of their motion for rehearing and to transfer to Court In Banc in this case and accordingly prepared a motion on behalf of respondent to modify opinion served a copy on Counsel for appellants, and forwarded same to the Clerk of this Court.

Wherefore, respondent prays that the Court grant him leave and permission to file respondent's motion to modify [fol. 371] opinion at this time which said motion is now in custody of the Clerk of this Court.

N. Murry Edwards, James A. Waechter, Douglas H.
Jones, Attorneys for Respondent.

Received copy of foregoing motion of respondent, etc., this 16th day of July, 1945.

M. G. Roberts, C. H. Skinker, Jr., Attorneys for Frank A. Thompson, sole trustee of the St. Louis-San Francisco R. R. Co., Appellant. Watts & Gentry, Attorneys for Appellant, Illinois Central Railroad Company.

And said motion to modify the opinion, which is now in custody of the Clerk of this Court, is in words and figures following, to-wit:

[fol. 371] IN THE SUPREME COURT OF MISSOURI, DIVISION
No. 1

[Title omitted]

RESPONDENT'S MOTION TO MODIFY OPINION

Comes now Respondent in the above entitled cause and moves the Court to modify its opinion filed herein on June 4, 1945, in the following respects and for the following reasons, to wit:

I

By stating and setting out on Page 1 of the opinion, between the third and fourth paragraphs, the issues made up as to negligence by the pleadings as against each appellant. The charge of negligence in respondent's petition against appellant trustees, is that while:

"Said Lyman Elmer Haney was standing near said switch, the defendants, J. M. Kurn and John G. Lonsdale, [fol. 372] trustees, etc., negligently caused, suffered, and permitted a rod, stick, or some other object to project out, or swing out from the side of said Frisco passenger train and to strike said Lyman Elmer Haney."

The allegations in plaintiff's petition as to negligence against the appellant, Illinois Central Railroad Company is that that Company was guilty of negligence which caused or contributed to cause the injury and death of said Lyman Elmer Haney by failing to furnish said Lyman Elmer Haney with a reasonably safe place in which to work in that the ground was high and uneven near said switch and that the light was insufficient and inadequate and that said Illinois Central Railroad Company negligently furnished and provided a place for Haney to work which was unsafe and dangerous.

Appellants' answers are general denials.

(a)

By further stating in the opinion on Page 1, that the issue of negligence against appellant trustees was submitted to the Jury by plaintiff's instructions, #1 and #2.

These instructions submitted to the Jury the question as to whether or not Haney was injured and killed by a rod or other object extending, swinging out or projecting beyond the side of the Frisco passenger train.

The case was submitted to the Jury as against the appellant, the Illinois Central Railroad Company, under plaintiff's instructions #3 and #4. These instructions submitted to the Jury the question of whether the Illinois Central Railroad had furnished Haney a safe place to work. Instruction No. 4 required the Jury to find that at the place where Haney worked and was required to work, the ground was high and uneven and the light was insufficient and inadequate and that by reason thereof, the place was unsafe and dangerous and that the failure, if any, of said defendant [fol. 373] constituted negligence and the instruction further directed the Jury that if Haney was injured as a direct result of said place being unsafe and dangerous, they should find for plaintiff and against the defendant, Illinois Central Railroad. Instructions #3 and #4 did not require the Jury to find that Haney was killed by any object projecting out beyond the side of the train. No objection has been made by the Illinois Central Railroad to the giving of instructions #3 and #4.

The above instructions #1, #2, #3, and #4 given at the request of plaintiff appear in appellant's abstract of record, at Pages 163 to 168.

Therefore, this Court should modify the opinion as above suggested so that it will show that separate issues were tried and submitted to the trial Court and Jury as to each appellant.

II

By inserting in line 30 from the top of page 2 of the opinion, between the word "to" and the word "close," the words "stand there and," so that it will read, "But it was Haney's duty to stand there and close the switch when the train cleared, etc.," and by inserting in the 29th line from the top of page 2, after the word "track," the following: "Mrs. Haney testified that the Frisco conductor told her he did not know where Haney was standing."

The evidence shows it was Haney's duty to open this switch and stand there until the train had backed in and

then close the switch (Resp. Add'l and Abs. p. 117). Witness Bruce testified:

"Q. That was the custom for him to do that? A. Yes, sir, that was his duty.

Q. Is that to open the switch and remain there until the train backed in and then go back to his shanty?

A. Yes, sir.

Q. That is the custom, isn't it? A. Yes, sir."

[fol. 374] Witness Arnold testified to the same thing (Resp. Add'l Abs. p. 31).

This shows that it was Haney's duty to be near the switch where he was killed.

Mrs. Haney testified the conductor told her after the accident that his memory wasn't good; that he didn't remember anything about Mr. Haney going to the south side of the track and didn't know where Haney was standing because he didn't see him afterwards (App. Abs. p. 159). This shows that the conductor was mistaken about Haney going to the south side of the track.

III

By inserting in the sixth line from the top of page 3, after the word "feet," the words and figures "or 30 inches," so that it will read, "The overhang of the Frisco mail car was about 2 feet or 30 inches, etc."

Witness Gates testified that the overhang of an ordinary passenger train was two to two and one-half feet or 24 to 30 inches to the side of the rail. This shows that the mail hook extends out two and one-half feet to the side of the car instead of two feet, as stated in the opinion (Resp. Add'l Abs. p. 18).

IV

By striking out of line 13 on page 3 of the opinion the word "top" and inserting in place thereof the word "bottom." So that it will read, "which knob, when the arm is down and resting against the side of the car, is about 6 feet 8 inches above the bottom of the rail, which is 7 inches high."

The evidence shows when the mail hook was hanging down on the side of the car, the bottom of the hook was 80 inches from the top of the ties or bottom of the rails

(App. Abs. p. 97). This amendment of the opinion to [fol. 375] form to the evidence will place the lower end of the mail hook 7 inches closer to the ground than the opinion now has it, and therefore more likely to strike Haney.

(a)

By inserting at the end of the third line from the top of page 9, "I think it was where something struck it, just what it was I couldn't say, but it was something that came in contact there, in my opinion. The mark was on the outside of the cap and in the back."

Witness Gates testified to the above. This tends to show that the mail hook struck Haney in the back of the head on the outside of his cap (App. Abs. p. 29).

V

By inserting and adding at the end of line 23 from the top of page 9 of the opinion that Witness Drashman also testified to the following:

" . . . I heard someone say that is what happened.

Q. Did you so testify? A. Yes.

Q. And that is true, isn't it? A. Yes.

By the Court: Now, do you want to explain your answer?

By the Witness: Yes, sir."

Defendants would not permit their employee to explain. The witness testified again:

"Q. Mr. Drashman, you said on direct examination that this statement about this thing sticking out from the train hitting Haney was made by an Illinois Central switchman, don't you remember telling me that?
A. I suppose it was a switchman, I don't know who it was.

Q. You said a moment ago that the man who made the statement that something sticking out from the [fol. 376] train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.

Q. That is true, isn't it? A. I think so, no one else was around there but I. C. men at that time."

The statement was made by the Illinois Central switchman who the evidence indicates was "present at an accident," to the effect that:

"I heard some say that is what happened. That is true? Yes. The man who made the statement, something sticking out from the train hit Haney, was an Illinois Central switchman."

The testimony quoted above is taken from the record (Resp. Add'l Abs. pp. 54, 55 and 67).

This shows that the I. C. switchman was present when Haney was struck because he said that is what happened. He did not say that he heard that was what happened. The opinion by only stating that Haney "was supposed to have been struck by something protruding on the side of the train" does not give plaintiff the most favorable benefit of the evidence which he is entitled to under the law. It does not give plaintiff the benefit of the most favorable inferences to be drawn from the evidence to which he is entitled.

VI

By striking out the figure "6" in the 22nd line from the top of Page 10 in the opinion and inserting in place thereof the figure "5" and by stating after the word "North" in line 24 from the top of Page 10, that Witness Drashman testified that Haney's body was lying parallel to the Frisco tracks.

[fol. 377] Witness Bundy testified on cross-examination (Resp. Add'l Abs. p. 28):

"Q. How far was his head north of the north rail of the track? A. I would say about five feet, five foot and a half."

Witness Drashman testified (Resp. Add'l Abs. p. 76):

"Q. Well, did you see Haney's body down there? A. Yes.

Q. How far was it from the Frisco switch, from the main line? A. I don't know, I didn't measure it.

Q. Well, how far was it from the Frisco tracks? A. I did not measure that.

Q. What would be your best judgment? A. About six feet.

Q. About six feet. Do you refer to the body or the head or what part of Haney's body would you refer to? A. Well, I think the whole body."

This shows that Haney was lying parallel to the tracks, not at right angles, as the opinion now states.

VII

By stating at the end of the sentence in line 20 from the top of Page 12 of the opinion, that the evidence tended to prove that the ground at the switch where Haney was killed, was high and uneven, that there was no artificial light at the switch and that it was so dark there that a three-inch pipe could not be seen 25 feet away, that Witness Craegh testified that he could not see how Haney was dressed at the switch ten feet away.

The above appears in the record of the abstracts of this appeal at Respondent's Additional Abstract pages 79, 129 and 130 and Appellants' Abstract page 144.

This will show that there was sufficient evidence to submit the question of an unsafe place to work as to appellant Illinois Central Railroad Co. to the jury.

[fol. 378]

VIII

All of the modifications and amendments asked for in this motion are supported by the record and are material to the issues and the respondent believes that he is entitled to have this opinion show the true state of facts, as indicated herein, so that he may seek to have this opinion reviewed by the United States Supreme Court

Respectfully submitted, N. Murry Edwards, James A. Waechter, Douglas H. Jones, Attorneys for Respondent.

[fol. 380] And thereafter and on the 4th day of September, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E.
Haney, Deceased, Respondent, }

vs.

J. M. KURN et al., Appellants

Now at this day the Court having seen and fully considered the motion of the respondent for leave to file a motion to modify the opinion in the above-entitled cause, doth order that said motion be, and the same is hereby overruled for the reason that such motion must be filed within the time allowed for motion for rehearing.

And thereafter and on the 11th day of September, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E.
Haney, Deceased, Respondent,

vs.

J. M. KURN et al., Appellants

Comes now the respondent, by attorney, and files a motion to withhold the mandate and stay further proceedings in the above-entitled cause, with service shown.

Which said motion to withhold the mandate and stay further proceedings is in words and figures following, to-wit:

[fol. 381] IN THE SUPREME COURT OF MISSOURI, DIVISION
No. 1, MAY TERM, 1945

No. 39,174

WALTER A. LAVENDER, Administrator de Bonis Non of the
Estate of L. E. Haney, Deceased, Respondent,

vs.

J. M. KURN et al., Trustees of St. Louis-San Francisco
Railway Company, Debtor, and Illinois Central Railroad
Company, Appellants

MOTION OF RESPONDENT TO WITHHOLD MANDATE AND STAY
FURTHER PROCEEDINGS

Comes now respondent in the above entitled cause and moves the Court to withhold sending a mandate to the trial court and stay all further proceedings in the above entitled cause until such time as the Supreme Court of the United States shall pass upon respondent's application for a writ of certiorari and for grounds of this motion, respondent states that the respondent intends to make application in the United States Supreme Court to have the opinion and judgment in the above entitled cause in this Court reviewed and reversed by the United States Supreme Court.

N. Murry Edwards, James A. Waechter, Douglas H. Jones, Attorneys for Respondent.

Received a copy of foregoing motion of respondent, etc., this 10th day of September, 1945.

C. H. Skinker, Jr., A. P. Stewart, Attorneys for Frank A. Thompson, sole trustee of the St. Louis-San Francisco R. R. Co., appellant. Wm. R. Gentry, Attorney for Appellant, Illinois Central Railroad Company.

[fol. 382] And thereafter and on the same day the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E. Haney, Deceased, Respondent,

vs.

J. M. Kurn et al., Appellants

Now at this day the Court having seen and fully considered the motion of the respondent to withhold the mandate and stay further proceedings in the above-entitled cause, doth order that said motion be, and the same is hereby sustained.

STATE OF MISSOURI, Sect.:

I, Marion Spicer, Clerk of the Supreme Court of the State of Missouri, hereby certify that the foregoing pages contain a full, true and correct copy of the record and proceedings in a cause entitled Water A. Lavender, Administrator de bonis non of the Estate of Lyman Elmar Haney, Deceased, respondent, against J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company, a corporation, appellants, No. 39,174, as fully and completely as the same appear of record and remain on file in my office.

I further certify that the respondent's motion to modify the opinion is a full, true and correct copy of the original motion, which is now in my custody.

In testimony whereof I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson City, State aforesaid, this 20th day of September, 1945.

Marion Spicer, Clerk of Supreme Court of Missouri.
(Seal.)

[fol. 383] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1945

No. —

WALTER A. LAVENDER, Etc., Petitioner,

vs.

J. M. KURN, et al., Trustees, Etc.

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION
FOR CERTIORARI

Upon consideration of the application of counsel for the
petitioner,

It is ordered that the time for filing a petition for cer-
tiorari in the above-entitled cause be, and the same is hereby,
extended to and including November 2, 1945.

Wiley Rutledge, Associate Justice of the Supreme
Court of the United States.

Dated this 24th day of September, 1945.

[fol. 383] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1945

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

(2285)

pany, a corporation (Defendants), Appellants, being No. 39,174 of causes on the docket of said Supreme Court of Missouri (R. 320-331), reversing the judgment of \$30,000.00 (Thirty Thousand Dollars) and costs of the Circuit Court of the City of St. Louis, Missouri, in said cause in favor of your petitioner and against the respondents herein (Respondents), which said judgment of the Supreme Court of Missouri, Division No. 1, became final on the 2nd day of July, 1945, by the overruling by that Court of petitioner's motion for a rehearing and to transfer said cause to the Supreme Court of Missouri in banc (R. 368). Upon application of your petitioner this Honorable Court did, on September 24, 1945, enter its order that the time for filing a petition for certiorari in this cause be, and the same was ordered extended to and including November 2, 1945.

OPINION OF THE COURT BELOW.

The opinion of Division No. 1 of the Supreme Court of Missouri in said cause of Walter A. Lavender, Administrator de bonis non of the Estate of L. E. Haney, Deceased (Plaintiff), Respondent, v. J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company (Defendants), Appellants, which petitioner here seeks to have reviewed, is reported in 189 S. W. 2nd, at page 253, and appears on pages 320 to 331 of the transcript of the printed record filed herewith.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was instituted by Evelyn Burke, as Administratrix of the Estate of L. E. Haney, Deceased, against J. M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company, Debtor, on the 15th day of November, 1940, in the Circuit Court of the City of St. Louis, Missouri, under the Federal Employers' Liability

Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), to recover for the alleged wrongful death of said deceased, resulting from injuries sustained by him while in the employ of defendants J. M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company, as a switch-tender.

Thereafter, on the 22nd day of October, 1942, plaintiff filed in the Circuit Court in said case a second amended petition in which Walter A. Lavender, Administrator de bonis non of the Estate of L. E. Haney, Deceased, was named as Plaintiff and the Illinois Central Railroad Company was named as a defendant in addition to the defendant Trustees. Said new defendant Illinois Central Railroad Company was thereafter duly served with summons and plaintiff did thereafter file in said cause his third amended petition to which said petition defendant Trustees and defendant Illinois Central Railroad Company did file separate answers which said answers were general denials.

Petitioner's third amended petition and complaint upon which this cause was tried charged that L. E. Haney was employed by the defendants as a switch-tender in throwing, setting and regulating switches for railroad cars and trains in the switchyard of the Grand Central Station at Memphis, Tennessee, on or about December 21, 1939; that he was ordered, directed and required by the defendants to throw or open a switch so that defendant trustees could back an interstate Frisco passenger train from Birmingham, Alabama, into the Grand Central Station at Memphis, Tennessee; that the said L. E. Haney did in performance of his duty and as a servant of defendants on said last-mentioned date, open a switch and that defendants' trustees did back said long interstate Frisco passenger train over the track and switch which said Haney had opened past Haney and past the place where Haney was standing near said switch and that as said interstate passenger train backed past Haney, defendant trustees negligently caused,

suffered and permitted a rod, stick or other object to project out or swing out from the side of the said Frisco passenger train and to strike said Haney knocking him to the ground and injuring him so severely that he died as a direct result of said injuries on the 21st day of December, 1939. Petitioner's complaint against defendant Illinois Central Railroad Company charged that said Railroad Company as the employer of L. E. Haney, the deceased, negligently failed to furnish Haney with a reasonably safe place to work, in that the ground where he was required to work was high and uneven and the light insufficient and inadequate and that the backing train had an object or rod sticking or swinging out to the side as it passed Haney and that said place was unsafe and dangerous.

At the beginning of the trial, defendant trustees' counsel made the following admissions on behalf of defendant trustees (R. 16-19), describing the work the deceased was doing at the time he was injured and killed as follows:

"3. That on and prior to December 21, 1939, Lymon Elmer Haney was employed by the Illinois Central Railroad Company, or a subsidiary corporation thereof known as the Y. & M. V. Railroad Co., as a switch-tender in the railroad yards near the Grand Central Station at Memphis, Tennessee. That his duties included the throwing of switches for said railroad, and also the Frisco and other railroads using the Grand Central Station; and that for his said services the said Frisco Trustees agreed with the Illinois Central Railroad Company to and did reimburse said Railroad Company for two-twelfths (2/12ths) of said Haney's wages."

It was shown that the Illinois Central Railroad Company owned and operated the Grand Central Station, and the passenger terminal at Memphis, Tennessee (R. 190-204).

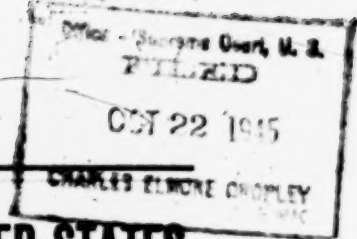
Ora L. Young, witness for the defendants, testified that at the time Haney was injured and killed, he was working as Superintendent of Terminals for the Frisco Railroad at Memphis, Tennessee; that under a contract between the two railroads pertaining to the use of the Grand Central Station and passenger terminal at Memphis, Tennessee, the Illinois Central Railroad sent monthly bills to and which were paid by the Frisco at the rate of \$1.87 1/2 for each Railroad car switched into Grand Central Station, that the Frisco R. R. also paid the Illinois Central Railroad Company 2 12ths of the regular three crossing flagmen's rate of pay, and 2 12ths of the electricity furnished for operation of color signals (R. 121-128). Haney was one of the three crossing flagmen mentioned, who were also known as switch tenders, working at the crossing referred to (R. 126).

It was admitted that Frisco passenger train #106 which arrived at Grand Central Station at Memphis, Tennessee on the evening of December 21, 1939 commenced its run at Birmingham, Alabama and was an inter-state train (R. 13).

The evidence showed that Lyman Elmer Haney, the deceased, while working as a switch-tender for Trustees defendants, and the Illinois Central Railroad, was injured and killed on December 21, 1939 in the switchyards at Memphis, Tennessee near the Grand Central Station by inter-state Frisco passenger train #106 of the trustees of the St. Louis-San Francisco Railway Company on its regular run from Birmingham, Alabama, to Memphis, Tennessee.

Haney, the deceased, in the performance of his duties as switch-tender, opened a switch to permit the Frisco passenger train to back into Grand Central Station (R. 218). Haney's duties required him to stand at or near the switch which he had opened until this Frisco train had backed in over the switch, after which Haney was required to immediately close the switch and return to his shanty nearby

FILE COPY



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator
de bonis non of the Estate of L. E.
HANEY, Deceased,

Petitioner,

vs.

J. M. KURN et al., Trustees of ST.
LOUIS-SAN FRANCISCO RAILWAY
COMPANY, Debtor, and ILLINOIS
CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.....

PETITION FOR WRIT OF CERTIORARI To the Supreme Court of Missouri and BRIEF IN SUPPORT THEREOF.

N. MURRY EDWARDS,
1028 Pierce Building,
St. Louis, Missouri,

JAMES A. WAECHTER,
3746 Grandel Square,
St. Louis, Missouri,

DOUGLAS H. JONES,
706 Chestnut Street,
St. Louis, Missouri,

Attorneys for Petitioner.

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Haney employed by respondents' railroads in interstate commerce at the time of his death..	34
(1) The evidence adduced at the trial of the cause on the issue of respondents' liability under the Employers' Liability Act for the death of Haney, as for negligence on the part of both respondents amply sufficed to make those issues one for the jury, and Division No. 1 of the Su- preme Court of Missouri erred in holding that petitioner was not entitled to have such issues submitted	36
(2) The evidence adduced at the trial on the issue of respondent, Illinois Central Railroad Com- pany's liability for failing to furnish Haney, its employee, with a reasonably safe place to work was amply sufficient to make that issue one for the jury, and Division No. 1 of the Supreme	

Court of Missouri erred in holding that petitioner was not entitled to have such issue submitted to the jury..... 42

(3) The ruling of the Supreme Court Court of Missouri, Division No. 1, that in this case no substantial evidence was adduced to warrant the submission of the case to the jury on the hypothesis that something protruding from the side of the passenger train struck Haney and that respondent Illinois Central Railroad Company negligently failed to furnish him with a safe place to work which resulted in his death, but that to submit the case on those theories would invite a verdict based on conjecture and speculation, is plainly out of accord with the applicable decisions of this Court..... 44

(4) The opinion of the Supreme Court of Missouri, in holding and deciding that there was not sufficient evidence to submit the question of the Illinois Central Railroad Company's liability to petitioner for failing to furnish Haney, its employee, a reasonably safe place to work, is in direct conflict with the decisions and holdings of this Court 49

(5) This court, on certiorari, is not confined to a consideration of the evidence stated by the state court in its opinion, but will review the entire record and determine for itself whether the evidence sufficed to take to the jury the issue of negligence; whether petitioner was denied a federal right by the opinion and judgment of the state court 51

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator
de bonis non of the Estate of L. E.
HANEY, Deceased,

Petitioner,

vs.

J. M. KURN et al., Trustees of ST.
LOUIS-SAN FRANCISCO RAILWAY
COMPANY, Debtor, and ILLINOIS
CENTRAL RAILROAD COMPANY,
Respondents.

No.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:

Comes now Walter A. Lavender, Administrator of the Estate of L. E. Haney, Deceased, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to review the opinion and judgment of the Supreme Court of Missouri, Division No. 1, rendered and entered on the 4th day of June, 1945, in the case lately pending in said Supreme Court of Missouri, Division No. 1, styled Walter A. Lavender, Administrator de bonis non of the Estate of L. E. Haney, Deceased (Plaintiff), Respondent, v: J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Com-

(R. 219, 305). A short time before Haney was injured and killed, he opened the switch and the Frisco passenger train started to back into the station over the switch. There were no eyewitnesses to the accident. Haney must have stood as his duty required him to, near the switch waiting for the train to back in and clear the switch, so he could close it. During the time the train was backing past Haney at about 8 or 10 miles an hour, something struck Haney in the back of the head, knocking him to the ground and rendering him unconscious. Haney did not close the switch after the train backed in as it was his duty to do and he did not regain consciousness, but died a short time thereafter.

Doctor W. E. Turner testified that he examined Haney's body soon after the accident and assisted in performing an autopsy on it; that there were no injuries externally on the body (R. 281); that his face was bruised where it struck the ground and there was a bruise on the back of his head, which caused a fracture of the skull that resulted in death (R. 282); that in his opinion, Haney's injury and death was caused by a small round fast-moving object striking Haney in the back of the head, which could have been a rod fastened to a train backing at the rate of 8 or 10 miles an hour (R. 283, 286). Witness Mee, the Engineer, testified the train backed into the station around a bad curve at about 10 miles per hour (R. 150). Witness Gates, who picked up Haney's white cap, testified that it had a mark on the outside of the back about 1½ inches long and an inch wide, and that the mark ran in an angle downward to the right of the center of the back of the head (R. 204, 205). Witness Gates further testified that it appeared to him that something had struck Haney in the back of the head above the ear and a little to the right of the center of the head and that he was told that the mark corresponded with the location of the injury on Haney's head (R. 204, 207). Witness Farmer, a railway mail clerk,

testified that the mail hooks hung down loose on the outside of the Frisco mail cars with a round knob at the bottom 80 inches above the bottom of the rail, which was 7 inches high, and that the mail hooks were not fastened at the bottom and would pivot and swing out 12 inches on the sway of the train (R. 97). Witness Drashman testified that the mail hooks could swing out three feet to the side of the train (R. 263). It was shown that there was a Frisco mail car coupled near the engine in the Frisco train which had a mail hook on either side, which were fastened at the top through brackets on the outside of the car. There were 12 cars in the Frisco train. The bottom of these mail hooks can swing out with the tip end of the hook about three feet to the side of the car (R. 72). Several witnesses testified that the ground at the switch where Haney was killed was covered with piles of cinders and was high and uneven and in some places was 18 inches to two feet above the rail (R. 298, 267 and 305). The deceased was shown to be five feet 7½ inches tall (R. 95).

Alvin Haney testified that he found a spot of blood 6 or 8 inches across after Haney's body was removed near the switch 3 or 4 feet north of the north rail of the track on which the Frisco train backed into the station upon high and uneven ground (R. 92, 93 and 298). It was shown that the passenger trains have an overhang of about 2½ feet out beyond the side of the rail (R. 206). The accident happened at about 7:30 P. M. There was no artificial light at the place. Witness Mee, the engineer, testified that he could not see a 2½-inch pipe 50 feet away at the switch (R. 152). Alvin Haney testified that he could not see a 3-inch pipe 25 feet away where his father was killed (R. 317). Defendant's Witness O'reagh testified that it was so dark that you could not see how a man was dressed ten feet away (R. 144). A light was erected over this switch immediately after the accident (R. 27, 309), which illuminated the place for some distance (R. 310). Witness

Drashman testified that he arrived at the scene of the accident within a few minutes after Haney's body was found lying face down (R. 265) and that an Illinois Central switchman there at the place at the time said that something sticking out from the train hit Haney. Witness Bundy testified that they turned Haney's body over while he was there (R. 32) and that he was not there over five minutes (R. 33). Witness Drashman, who was in the employ of one of the defendants, made several statements about what was said at the time Haney's body was found. We quote from the record (R. 242-243):

“ . . . I heard someone say that is what happened.

Q. Did you so testify? A. Yes.

Q. And that is true, isn't it? A. Yes.

By the Court: Now, do you want to explain your answer?

By the Witness: Yes, sir.”

Defendants would not permit their employee to explain.

The witness testified again (R. 255):

“Q. Mr. Drashman, you said on direct examination that this statement about this thing sticking out from the train hitting Haney was made by an Illinois Central switchman, don't you remember telling me that?

A. I suppose it was a switchman, I don't know who it was. * * *

Q. You said a moment ago that the man who made the statement that something sticking out from the train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.

Q. That is true, isn't it? A. I think so, no one else was around there but I. C. men at that time.”

Again witness Drashman testified (R. 75):

“As to the man who made the statement about something sticking out of the train, I thought he was

an Illinois Central switchman; but as a matter of fact, I did not make any investigation or any effort to find out whether that man was working for the Illinois Central or for the Yazoo & Mississippi Valley Railroad, and I do not know what railroad company that man was working for."

Redirect Examination, by Mr. Edwards:

"I do know though from his appearance that he was a railroad switchman. He was dressed and had all the appearance of a railroad switchman."

The opinion gives as one reason why the Supreme Court finds that Haney was not struck by something projecting from the side of the car; that the evidence is to the effect that Haney's body was lying with the head toward the track with the body extending north at a right angle to the track. This conclusion is not in accordance with the testimony of the witnesses. Witness Bundy, in describing the direction in which Haney's body was lying, stated that his head was pointing southeast (R. 213).

"Q. His head was pointing, as you say, southeast?
A. Yes, sir.

Q. And this Frisco train had just backed east and toward north? A. Yes, sir.

Q. Into the station? A. Yes, sir."

Witness Drashman testified that Haney's body was lying parallel to the track when it was first found (R. 264):

"Q. Well, did you see Haney's body down there?
A. Yes, sir.

Q. And how far was it from the Frisco switch, from the main line? A. I don't know, I didn't measure it.

Q. How far was it from the Frisco tracks? A. I didn't measure it.

Q. What would be your best judgment? A. About 6 feet.

Q. About 6 feet. Do you refer to the body or the head or what part of Haney's body would you refer to? A. Well, I think the whole body."

The Supreme Court's opinion gave as one of its reasons for finding that a mail hook did not strike Haney was because they claimed that the evidence showed that the track where Haney was killed was straight. This was error. Defendant's witness Mee, engineer in charge of the train that killed Haney, testified (R. 150):

"After I got moving, I was going about 8 miles an hour. Of course, we have to increase the speed a little bit around the curve, because it is a bad curve and I suppose you would be going about 10 miles an hour there. I don't think we could have been going any faster than that around a curve."

Witness Bundy testified that the track where Haney's body was found was on a curve (R. 213), as he stated the Frisco train had just backed east and north before Haney was found.

The Supreme Court of Missouri's opinion states that the evidence shows that Haney was on the south side of the track when the Frisco passenger train backed past him, that Rule No. 104 required Haney to cross to the south side of the track after opening the switch and further that defendant's witness Creigh testified that he saw Haney go to the south side of the track after he opened the switch. The evidence at the trial contradicted all of these claims in that Mrs. Haney, the deceased's widow, testified that she had heard it was claimed by Mr. Creigh that her husband had gone to the south side of the track after he had opened the switch and that she called upon Mr. Creigh, the conductor, and he told her (R. 159):

"He said his memory wasn't so good. He said he didn't remember anything about my husband going

to the south side of the track. He didn't know where he was standing or anything about it; and he couldn't remember; he didn't see him afterwards."

Defendant's witness Brusco testified that it was Haney's duty after he had opened the switch to remain there north of the track; that that was the custom and practice (R. 305):

"Q. Haney's next duty, after that train backed in there, was to close that switch, wasn't it? A. Yes, sir.

Q. And he should have done that after the train backed in there, immediately after the train cleared the switch? A. Yes, sir.

Q. That was a custom for him to do that? A. Yes, sir; that was his duty.

Q. His duty to open the switch and remain there until the train backed in, and then go back to his shanty? A. Yes, sir.

Q. That is the custom, isn't it? A. Yes, sir."

Witness Arnold testified (R. 219):

"Q. And then after giving such a signal to back up—that is the signal to back up you are talking about? A. Yes, sir.

Q. You did give such a signal after you had thrown the switch and opened it? A. Yes, sir.

Q. Then what would you next do? A. Well, you would just stand there and wait until the train got back.

Q. Backed up, you mean? A. Yes, sir.

Q. And when the train backed up, then next what would you do? A. Close the switch."

The Instructions.

Petitioner, the plaintiff in the trial court, submitted his case to the jury as to each of the defendants under separate instructions. Plaintiff's instruction No. 2 submitted the question of the liability of defendant trustees of the

St. Louis-San Francisco Railway Company for the death of Haney (R. 164-165). It required the jury to find among other things that a rod or other object was extending out to the side of the train as it passed Haney and that the defendant was guilty of negligence in permitting the object to swing out and that Haney was killed as a direct result of such negligence, if any. The liability of the Illinois Central Railroad Company was submitted to the jury under plaintiff's instruction No. 4 (R. 166-168). Instruction No. 4 required the jury to find that the ground where Haney was required to work, was high and uneven and that the light was insufficient and inadequate and the place was unsafe and dangerous and that the defendant Illinois Central Railroad Company had failed to exercise ordinary care to make said place reasonably safe and that such failure, if any, constituted negligence and that if they found that Haney was injured and killed as a direct result of said place being unsafe and dangerous, then they should find for plaintiff and against the Illinois Central Railroad Company. This instruction did not require the jury to find that Haney was killed by something sticking out from the side of the passing train. No complaint was made against the correctness of this instruction on appeal in the Missouri Supreme Court.

The Verdict and Judgment.

The case was submitted to the jury as to each of the defendants on the above-mentioned instructions and on a measure of damage instruction. The jury returned a verdict against both defendants in favor of petitioner for \$30,000.00. A judgment was entered in the trial court against both defendants in favor of petitioner for the sum of \$30,000.00 and costs. Both defendants filed motions for a new trial and the trial court overruled said motions. Thereafter, the defendants were allowed separate appeals.

to the Supreme Court of Missouri. Thereafter, respondents herein, as appellants in the State Court, duly perfected their separate appeals from said judgment in favor of petitioner in said cause, and said cause was briefed, argued and submitted in Division No. 1 of said Supreme Court on May 1, 1945 (R. 320). Thereafter, on June 4, 1945, said Division No. 1 of said Supreme Court of Missouri, in an opinion filed in said cause on said day (R. 320), ruled that there was no substantial evidence to support the submission of the case to a jury under the hypothesis that a mail hook struck Haney, the deceased. The opinion further held that a mail hook could have struck Haney but that it did not. The opinion also held that the testimony of witness Drashman as to the statement made to him by an Illinois Central switchman a few minutes after Haney's body was found at the scene of the accident, that Haney had been struck by something protruding from the side of the train, was not competent under the res gestae rule, and that there was not sufficient evidence to submit the question of whether something sticking out from the Frisco interstate passenger train struck Haney, and that there was not sufficient evidence that the insufficient light and high and uneven ground and unsafe and dangerous place to work in whole or in part caused or contributed to cause the injury and death of Haney. The Missouri Supreme Court in its opinion held that "it would be mere speculation and conjecture to say that Haney was struck by a mail hook," and further held that all reasonable men in the honest exercise of a fair and impartial judgment would draw the same conclusions from the facts in this case, and it also held that they would not affirm the verdict and judgment for petitioner, because they said that it was based on "conjecture and speculation." The Supreme Court of Missouri, by its opinion and judgment rendered and entered June 4, 1945, reversed the \$30,000.00 judgment in favor of petitioner.

Thereafter, on the 18th day of June, 1945, and within the time allowed therefor by the rules of said Supreme Court of Missouri, petitioner duly filed in said cause, in said Division No. 1 of the Supreme Court of Missouri, his motion for a rehearing and to transfer said cause to the court in banc and suggestions in support of said motion, the Highest Court of the State of Missouri under Section 4 of the Amendment of 1890 to Article VI of the Constitution of the State of Missouri, providing that "when a Federal question is involved, the cause, on the application of the losing party, shall be transferred to the Court (in banc) for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the Court (in banc) for its decision."

Thereafter, on the 2nd day of July, 1945, petitioner's said motion for a rehearing and to transfer said cause from said Division No. 1 of the Supreme Court of Missouri to the Court (the Supreme Court of Missouri) in banc, was by Division No. 1 of the said Supreme Court overruled, whereby and on which day said judgment of said Division No. 1 of the Supreme Court of Missouri in said cause, reversing said judgment in favor of petitioner, became final.

Petitioner, prior to July 17, 1945, delivered to the Clerk of the Supreme Court of Missouri his motion to modify the opinion of the Supreme Court of Missouri in which said motion petitioner asked that said Supreme Court modify its opinion by stating the issues and the facts in accordance with the record, as will more particularly appear in said motion to modify. The Clerk of the Supreme Court of Missouri refused to file petitioner's said motion to modify. Petitioner thereupon, on July 17, 1945, filed in said cause in the Supreme Court of Missouri, his motion for leave to file said motion to modify the opinion, for the reason that no rule of the Supreme Court of Missouri specifies or provides when a motion to modify an opinion should be filed. Thereafter, on September 4, 1945, the

Supreme Court of Missouri entered its order in said cause overruling petitioner's motion for leave to file his motion to modify the opinion and gave as a reason for said ruling that said motion to modify was not filed within the time allowed for filing a motion for rehearing. The Supreme Court of Missouri did on September 11, 1945, on motion of petitioner, order its mandate stayed in said cause.

The duly certified record, including all of the proceedings in said cause in said Circuit Court of the City of St. Louis, Missouri, and in said Division No. 1 of the said Supreme Court of Missouri, is filed herewith under separate cover.

Thereafter this Honorable Court on the application of your petitioner did on September 24, 1945, order the time extended in which your petitioner might file a petition for certiorari in this cause to and including November 2, 1945.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 237 of the Judicial Code as amended and reformulated by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 937, Title 28, U. S. C. A., sec. 347, providing that it shall be competent for this Court, by certiorari, to require that there be certified to it for review and determination any cause wherein a final judgment or decree has been rendered by the highest court of a state in which a decision could be had where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute, of, or commission held or authority exercised under, the United States.

The judgment of the Supreme Court of Missouri, Division No. 1, sought to be reviewed was originally entered on June 4, 1945 (R. 320). A motion for a rehearing and to transfer said cause from Division No. 1, to the Missouri Supreme Court in banc, was filed on June 18, 1945, within

the time provided by the rules of the Supreme Court of Missouri (R. 332) and said motion of petitioner for a rehearing and to transfer said cause to the Missouri Supreme Court in banc was denied by said Division No. 1 of the Supreme Court of Missouri on July 2, 1945, which is the date on which the judgment of said Division No. 1 of the Supreme Court of Missouri in said cause became final. Division No. 1 of the Supreme Court of Missouri, upon its refusal to grant a rehearing and to transfer the cause to the Court in banc, was the highest Court of the State in which a decision could be had in said cause; and in said cause, petitioner specially set up and claimed a right under a statute of the United States, namely, the Employers' Liability Act, 45 U. S. C. A., sec. 51, Act of April 22, 1908, c. 149, sec. 8, 35 Stat. 65 (R. 2-6). Which right was denied petitioner by said Supreme Court of Missouri, Division No. 1.

Cases thought to sustain the jurisdiction are:

Seago v. New York Central R. Co., 315 U. S. 781, 62 Sup. Ct. Rep. 806;

Jenkins v. Kurn, 313 U. S. 256, 61 Sup. Ct. Rep. 934;

New York Central R. Co. v. Marcone, 281 U. S. 345;

Puget Sound Power & Light Co. v. County of King, 264 U. S. 22.

QUESTIONS PRESENTED.

The Questions presented by Petitioner's Petition herein for a Writ of Certiorari are:

1. Whether, in an action against a Railroad carrier under the Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65) to recover for the death of an employee of defendant railroad, the evidence relating to the cause of death sufficed, under the applicable decisions of this Court, to warrant

the submission to a jury of the issue of negligence in striking the railroad's switch-tender, Haney, with a mail hook, rod or other object projecting from the side of a train operated by the railroad employer, or, whether plaintiff's case may be said to rest entirely upon such inferences that the submission thereof to a jury would invite a verdict based upon speculation and conjecture.

The evidence adduced by plaintiff, together with the reasonable inferences fairly and reasonably arising therefrom, tends to show that the deceased was a switch-tender assisting in the movement of the interstate passenger train; that he threw the switch permitting the train to back over the switch track into the station; that his duties required him to wait at the switch until the train had cleared and then to close it; that after the train passed, he was found unconscious lying face down within 5 to 6 feet from the track over which the train had passed, with his head pointing in the direction of the movement of the train, with a diagonal wound across the back of his head, at the base of his skull, extending upwards, causing a fracture of the skull, from which he died without regaining consciousness. The doctor who performed a post-mortem testified that in his opinion the wound was such as might have been caused by a small, round, fast moving object, which could have been a rod attached to the side of a train backing 8 or 10 miles an hour. The evidence tended to show that the deceased was standing on a mound of cinders, which raised his head to a height where it would have been struck by a mail hook extending from the side of the passing train; that there was a mail hook swinging loose attached to a car near the engine of the 12-car train that passed and that said hook would swing out on the sway of the train or on rounding a curve going at the rate of 8 to 10 miles per hour; that the train was rounding a bad curve at such a rate of speed at the place where deceased was afterwards found unconscious with the kind

of a wound in the back of his head which would have been made if a mail hook had struck him there. There was no evidence of any kind that anything else could have killed Haney.

2. Whether, in an action under the Employers' Liability Act for the injury and death of a switch-tender employed in interstate commerce by defendant carrier in its switchyard, the evidence relating to a *res gestae* statement sufficed, under the applicable decisions of this Court, to warrant the submission of the case to the jury, or whether such submission would invite a verdict based upon conjecture and speculation as held by Division No. 1 of the Supreme Court of Missouri. The evidence adduced, together with all fair and reasonable inferences to be derived therefrom, positively showed that an employee of defendant Frisco Railroad Company positively stated that, when he arrived at the scene of the accident a few minutes after deceased's body had been found and before it had been turned over or moved, he heard an Illinois Central switchman, there at the scene, at the time, state that:

• "Something sticking out from the train hit Haney," and "that is true."

3. Whether, in an action under the Federal Employers' Liability Act, for the injury and death of a switch-tender employed in interstate commerce by defendant carrier in its switchyard, the action of the highest court in a state in which a decision could be had in said cause in ruling that plaintiff made no case for the jury, against his employer for failure to furnish a safe place to work, and without taking into consideration undisputed testimony favorable to plaintiff, was erroneous and not in accord with the applicable decisions of this Court. There was substantial evidence that the place of work furnished decedent was dangerous and unsafe and that his death was caused by such

dangerous and unsafe place of work. Plaintiff submitted his case as against the Illinois Central Railroad on an instruction requiring the jury to find that the ground where Haney was required to work was high and uneven and that the light was insufficient and inadequate and the place was unsafe and dangerous and that said Railroad had failed to exercise ordinary care to make said place reasonably safe and that such failure constituted negligence before they should find against the I. C. Railroad. The jury so found. The evidence proving such place was dangerous and unsafe was clear, cogent and convincing; it was uncontradicted and undisputed. The evidence showed that there were mounds and piles of cinders from 18 inches to 2 feet above the level of the rail and that there were no artificial lights; that it was at nighttime and objects could not be seen and distinguished 10 feet away; and that if Haney had stood upon such mound he would have been hit on the head by the swinging mail hook as the train backed past him around the curve.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

This action is brought for the death of a Railway employee under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 1, Act of April 22, 1908, § 149, Sec. 1, 35 Stat. 65). Decedent was a switch-tender employed in interstate commerce. At the time of his death, he was switching an interstate passenger Frisco train over the tracks of defendant Illinois Central Railroad Company into its station at Memphis, Tennessee. It was admitted in evidence that the Frisco Railroad Company paid the Illinois Central Railroad Company \$1.87½ for each car in said passenger train and that the Frisco Railroad Company reimbursed the Illinois Central Railroad Company for \$2 12

of Haney's wages under an agreement between the said two defendant Railroad Companies. Both defendants admitted that Haney was in the performance of his duty at said time in the opening and closing of said switch in the switching of said interstate passenger train into the station. The evidence showed that the Frisco passenger train consisted of 12 cars, engine and tender, with a mail car next to the tender; that said mail car was equipped with mail hooks on each side of the mail car; that said mail hooks were fastened at the top, swinging loose at the bottom, with the loose end terminating in a rounded end or ring or knob; that when said passenger train backed around the curve and over the switch which had just been opened by decedent, it was moved at the rate of 8 to 10 miles per hour; that when mail hooks on mail cars round curves they will swing outwards a distance from 12 inches to 3 feet from the side of the car (R. 97, 269). The bottom of the hook when at rest, was 80 inches above the bottom of the rail (R. 97); that when the car swayed or moved around the curve the bottom of the hook would swing out in an arc with its distance from the ground increasing as it extends out. Haney was 5 feet, $7\frac{1}{2}$ inches tall, which is $67\frac{1}{2}$ inches from the ground. There were mounds of cinders near the track where Haney was stationed to perform his switch duties and where he was later found dead. These mounds were from 18 inches to 2 feet above the top of the rail (R. 267, 298, 360). The rail was 7 inches high. Therefore, Haney standing on a level with the rail $67\frac{1}{2}$ inches tall, when he stood upon a mound 18 inches high, would place him $85\frac{1}{2}$ inches above the top of the rail. The knob end of the mail hook was 73 inches from the top of the rail. This would place the back of his head, where the wound was found, directly at the height where the mail hook, fastened to the side of the passing train, would have struck him. There was evidence by Doctor Turner, who performed the post-mortem, that Haney's skull had

been fractured, causing death; that the wound was caused by a small, round, fast-moving object striking deceased in the back of the head and that such wound could have been caused by a rod attached to the side of a train backing 8 or 10 miles an hour (R. 282-284). Witness Gates, another switch-tender, testified that he examined Haney's white cap immediately after he was found and that it had a dark mark about 14½ inches long and an inch wide which ran at an angle diagonally upward across the outside of the back of the cap which corresponded to the wound on Haney's head (R. 204, 205 and 207). There were no other injuries except bruises on his face caused by ~~it~~ striking the ground when he fell forward in the direction in which the train was moving. A Frisco employee testified that he arrived at the scene of the accident a few minutes after Haney's body had been found and before it had been turned over or moved, and that he heard an Illinois Central switchman, there at the scene, at the time, state that (R. 242-243, 255):

“Something sticking out from the train hit Haney
• • • that is true.”

There was no evidence of any kind adduced that anything happened to Haney to cause his death other than the movement of the train with something projecting therefrom. There was testimony that there were no other rods, pipes, weapons or anything that could have caused the wound in Haney's head found anywhere near the scene of the accident, with the exception of his own pistol which had slipped out of his pocket and was lying under his body (R. 32, 114, 212).

This evidence, with the inferences fairly and reasonably arising therefrom, tended to show that defendants negligently caused Haney's death by striking him with some object projecting out from the side of the Interstate train. Nevertheless, Division No. 1 of the Supreme Court of Missouri, in its opinion in said cause (*Lavender v. Kurn et al.*)

189 S. W. 2nd 253), ruled that plaintiff failed to make a case for the jury and ruled that the submission of the case to the jury would invite a verdict based upon conjecture or speculation. Said ruling is erroneous and not in accord with the applicable decisions of this Honorable Court holding that on the question where a case is one for the jury the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn from the evidence; that the credibility of the witnesses and the weight to be given to their testimony are for the jury; and that if, on the issue of liability reasonable and fair-minded men may honestly draw this inference from the evidence, such issue is not one of law for the Court, but one of fact for the jury.

(A) The circumstantial evidence commented on above was sufficient to take the case to the jury irrespective of the statement of defendant Illinois Central Railroad Company's employee, made at the time the body was found, that Haney had been struck by something projecting from the side of the defendant Frisco's interstate passenger train. All circumstances unequivocally proved that Haney was performing his duty and that he had thrown the switch for the passage of the Frisco passenger train; that the train backed past Haney in the dark; that his duties required him to remain at that switch and close it immediately after the train passed (R. 219, 305). When it was found that the switch was not closed, investigation was immediately made and Haney was discovered near the switch, unconscious with a fractured skull, 5 or 6 feet from the track over which the train had just passed. The evidence further showed as above mentioned that the train contained a mail car with a swinging mail hook on each side which could have struck him and fractured his skull. The Missouri Supreme Court's opinion admits that Haney could have been so struck as the jury found (R. 325), but not

cludes that he was not so struck. Under the law such evidence was amply sufficient to take the case to the jury.

(B) The circumstantial evidence above mentioned under Subdivision A is supplemented by the testimony of defendant Drashyjan that an Illinois Central switchman had said, immediately after the body had been found, that Haney had been struck by something projecting from the side of the interstate train. The Missouri Supreme Court held that the statement was incompetent and erroneous, saying:

“The statement of the switchman that Haney was supposed to have been struck by something protruding on the side of the train was not competent under the *res gestae* rule.”

We submit the evidence on this point was clear and positive that the Illinois Central switchman had said that:

“Something sticking out from the train hit Haney,”
and “That is true” (R. 75, 242-243, 255).

The law is that such statements are proper and that when admitted by the trial court should be sustained by an appellate court.

II.

In this case, Petitioner claimed the right to recover under the Federal Employers' Liability Act for the death of an employee of respondent Illinois Central Railroad Company for the negligence of said Company in failing to furnish its employee a safe place to work. The evidence clearly showed that at the place he was required to work the ground was high and uneven near the switch where decedent was working and that the light was so insufficient and inadequate that Haney could not see and be seen. The evidence shows that while Haney was in the performance of his duty, switching an interstate passenger train in such

dark and unsafe place, he was struck while the train was passing him and before he had had an opportunity to complete his work by closing the switch after the train had passed over it. Respondents claimed there was no need for any light at the switch, but after Haney was killed, erected one over the switch (R. 206, 309). Such testimony regarding the matter was plainly for the jury. The decision of Division No. 1 of the Supreme Court of Missouri that no case was made for the jury and that there was no substantial evidence that the uneven ground and the insufficient light were causes or contributing causes of the death of Haney are not in accord with the ruling of this Court.

Instruction No. 4, which submitted the question of unsafe place to work as to defendant Illinois Central Railroad Company, required the jury to find that the ground where Haney was required to work was high and uneven and that the light was insufficient and inadequate, and that the place was unsafe and dangerous and if the jury so found that the unsafe and dangerous place could have caused Haney's death they would find for plaintiff. It required the jury to find only that Haney was killed as a direct result of said place being unsafe and dangerous. The decision of the Supreme Court of Missouri denied the jury the right to find the proximate cause of Haney's death and is violative of the fundamental principles to be observed in passing upon a defendant's demurrer as announced and applied in a long line of decisions of this Court holding that, in determining whether a case is made for the jury, the plaintiff will be accorded the benefit of every inference favorable to him fairly and reasonably deducible from the facts in evidence; that conflicts in the testimony, the credibility of the witnesses and weight of evidence are for the jury; and that a negligence case will never be withdrawn from the jury if on the issue of negligence where reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence. It is a matter

of prime public importance that the rights vouchsafed to railroad employees and their dependents by the Federal Employers' Liability Act be recognized and enforced by every court in the land in which an action may be brought under the Act. To that end, and to the end, too, that right and justice may prevail in this case, this Honorable Court's writ of certiorari should issue herein.

III.

Petitioner in his motion for a rehearing (R. 333-367) called the Missouri Supreme Court's attention to its failure to take cognizance of the testimony which it branded as not properly admitted under the *res gestae* rule, but said motion was overruled. Such action on the part of that court was erroneous and not in accord with the applicable decisions of this court holding that on the question of whether a case for the jury is made all of the material evidence bearing upon that issue must be considered. Thereby, petitioner was denied a Federal right calling for the issuance by this court of its writ of certiorari herein to bring before this court the entire record for review.

IV.

The Supreme Court of Missouri, Division No. 1, by its said decision and judgment in this cause, denied petitioner a right specially set up and claimed by him, as the administrator of decedent's estate, under the Federal Employers' Liability Act, namely, the right to have his case submitted to a jury on the theory that the injury and death of said deceased, while employed by respondents in interstate commerce, resulted from the negligence of respondents, when there was evidence adduced rightfully engendering that conclusion. It is submitted that the denial to petitioner of such right plainly calls for the issuance by this Court of its writ of certiorari herein.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court directed to the Supreme Court of Missouri to the end that the said opinion and judgment of Division No. 1 of said Supreme Court of Missouri in said cause of Walter A. Lavender, administrator d. b. m. of the Estate of L. E. Haney, deceased, Respondent, v. J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company, a corporation, Appellants, No. 39,174, be reviewed by this Court, as provided by law, and that upon such review said judgment be reversed, and that petitioner have such other relief as to this Court may seem appropriate.

**N. MURRY EDWARDS,
JAMES A. WAECHTER,
DOUGLAS H. JONES,**

Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri in said cause of Walter A. Lavender, Administrator de bonis non of the Estate of L. E. Hancy, deceased (Plaintiff), Respondent, v. J. M. Kurn et al., Trustees of the St. Louis San Francisco Railway Company, Debtor, and Illinois Central Railroad Company, a corporation (Defendants), Appellants, which petitioner here seeks to have reviewed, is reported in 189 S. W. (2nd) at page 253, and appears on pages 320-331 of the transcript of the printed record filed herewith.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's Petition for a Writ of Certiorari, and in the interest of brevity are not repeated here. Reference will be made to such facts on the points involved in the course of the argument which follows.

SPECIFICATIONS OF ERROR TO BE URGED.

The Supreme Court of Missouri, Division No. 1, in its said opinion in said cause, erred:

(1) In holding and deciding that the evidence adduced at the trial of said cause below, did not suffice to make the case one for the jury, and that therefore, petitioner, as a matter of law, was not entitled to recover under the Employers' Liability Act as against respondents, J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor.

(2) In holding and deciding that the evidence adduced at the trial of said cause below, did not suffice to make the case one for the jury, and that therefore, petitioner, as a matter of law, was not entitled to recover under the Employers' Liability Act as against respondent, the Illinois Central Railroad Company, a corporation.

(3) In holding and deciding that no substantial evidence was adduced at the trial of said cause to warrant the submission of the case to the jury on the hypothesis that respondents, J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, negligently caused, suffered, and permitted a rod, stick or other object to project out or swing out from the side of its interstate passenger train and to strike and injure and kill Haney, the deceased.

(4) In holding and deciding that no substantial evidence was adduced at the trial of said cause to warrant the submission of the case to the jury on the hypothesis that respondent Illinois Central Railroad Company negligently failed to furnish its employee, Haney, the deceased, with a safe place to work, which negligence in whole or in part resulted in Haney's death.

(5) In holding and deciding that to submit the case to the jury, upon the theory that Haney's death was caused by something protruding out on the side of the interstate train as it backed in to Grand Central Station which resulted in Haney's death, would invite a verdict based on speculation or conjecture.

(6) In holding and deciding that to submit the case to the jury, on the theory that respondent Illinois Central Railroad Company negligently failed to furnish Haney, its employee, with a safe place to work and negligently furnished him with a dangerous place to work which resulted in Haney's death, would invite a verdict based on speculation or conjecture.

(7) In failing and refusing to consider, on the question of whether the case was for the jury as to each of the two Railroads, material testimony and evidence favorable to petitioner, having an important bearing on that issue.

(8) In inadvertently and erroneously drawing the wrong conclusions and making the wrong description of the evidence as to each of the Railroad respondents on the question of whether the case was one for the jury and in failing to consider testimony in evidence favorable to petitioner having an important bearing on the issues tried and decided by the trial court.

(9) In failing to properly consider and sustain petitioner's motion for a rehearing.

(10) In failing and refusing to amend the opinion in accordance with petitioner's motion to modify same.

SUMMARY OF THE ARGUMENT.

(1)

The evidence adduced at the trial of said cause of Walter A. Lavender, administrator d. b. n., of the Estate of L. E. Haney, deceased, v. J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and the Illinois Central Railroad Company, on the issue of respondent's liability for the injury and death of said L. E. Haney under the Employers' Liability Act as for negligence on the part of respondent, J. M. Kurn et al., Trustees, etc., in permitting something to protrude out to the side of their interstate passenger train as it passed Haney, the deceased, amply sufficed to make that issue one for the jury; and Division No. 1 of the Supreme Court of Missouri erred in holding that petitioner was not entitled to have such issue submitted to the jury.

(2)

The evidence adduced at the trial of said cause of Walter A. Lavender, d. b. n., of the Estate of L. E. Haney, deceased, v. J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company, a corporation, on the issue of respondent, Illinois Central Railroad Company's liability for the injury and death of said Haney, under the Employers' Liability Act as for negligence on the part of respondent, Illinois Central Railroad Company, in failing to furnish its employee Haney a safe place to work, and in furnishing him a dangerous place to work, amply sufficed to make that issue one for the jury; and Division No. 1 of the Supreme Court of Missouri erred in holding that petitioner was not entitled to have such issue submitted to the jury.

(3)

The ruling of Division No. 1 of the Supreme Court of Missouri that the evidence adduced in said cause constituted no substantial evidence to warrant the submission of the case to the jury on the hypothesis that respondent trustees negligently caused, suffered and permitted a rod, or other object to protrude out to the side of its interstate train and that respondent Illinois Central Railroad Company failed to furnish Haney, its employee, with a safe place to work and furnished him with a dangerous place to work that resulted in Haney's death, and that to submit the case on these theories would invite a verdict based on conjecture or speculation, is not in accord with the applicable decisions of this Court holding that on the question whether a case is made for the jury, the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn therefrom; that conflicts in the evidence, the credibility of witnesses, and the weight to be given to their testimony, are for the jury; and that, if on the issue of liability, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, the question is one for the jury.

- Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29;
Seago v. N. Y. Cent. R. Co., 315 U. S. 781, 62 Sup.
Ct. Rep. 806;
Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720;
Myers v. Pittsburgh Coal Co., 233 U. S. 184, 16 L. Ed.
193, 58 L. Ed. 906;
New York Central R. Co. v. Marcone, 281 U. S. 345,
74 L. Ed. 892;
Jenkins v. Kurn, 313 U. S. 256, 61 Sup. Ct. 934;
Lumbra v. United States, 290 U. S. 551, 553, 78 L.
Ed. 492;

Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 527, 69 L. Ed. 419;
Best v. District of Columbia, 291 U. S. 411, 78 L. Ed. 888;
Choctaw O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. Ed. 96;
Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473;
Hayes v. Michigan Central R. Co., 111 U. S. 228, 28 L. Ed. 410;
Barney v. Schneider, 9 Wall. 248, 19 L. Ed. 648;
Pawling v. United States, 4 Cranch. 219, 2 L. Ed. 601.

(4)

The State Court erred in failing to take into consideration testimony highly favorable to petitioner given by witnesses Drashman, Alvin Haney, Brusio, Turner and Gates. Under both the Federal rule and the State rule whether the case was one for the jury was a matter to be determined on appeal by a consideration of all the evidence material to that issue.

Western Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473;
Stauffer v. Metropolitan Street Ry. Co., 243 Mo. 305, 316;
Lorton v. Mo. Pac. R. Co., 306 Mo. 125, 137;
Rosenssweig v. Wells, 308 Mo. 617, 273 S. W. 1071;
Johnson v. Southern Ry. Co., 351 Mo. 1110, 175 S. W. 2nd 802.

(5)

This court, on certiorari, is not confined to a consideration of the evidence stated by the State Court in its opinion, but will review the entire record and determine for itself the sufficiency of the evidence and whether petitioner was denied a Federal right by the opinion and judgment below.

Great Northern Ry. Co. v. State of Washington,
300 U. S. 154, 81 L. Ed. 573;

United Gas Public Service Co. v. State of Texas,
303 U. S. 123, 143, 82 L. Ed. 702;

Chicago Great Western R. Co. v. Rambo, 298
U. S. 99.

ARGUMENT.

This is an action under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Section I, 35 Stat. 65), brought by Walter A. Lavender, Admr., d. b. n. of the Estate of L. E. Haney, deceased, for the benefit of the widow and children of the deceased, to recover damages for the alleged wrongful death of said deceased, charged to have been proximately caused by the negligence of the respondent, J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company, Defendant, in negligently causing, suffering, and permitting a rod or other object to project out from the side of its interstate passenger train and the negligence of respondent, Illinois Central Railroad Company, in failing to furnish Haney, the deceased, its employee, with a safe place to work.

The pertinent provisions of the Employers' Liability Act are:

"Every common carrier by railroad while engaged in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representatives . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

The undisputed evidence in the record is that L. E. Haney was a switch tender and was working at the duties assigned to him at the time he was injured and killed December 21, 1939, in the railroad yards near the Great Central Station at Memphis, Tennessee. The undisputed evidence also shows that it was Haney's duty to open the switch for the respondent, trustees interstate company passenger train on its regular run from Birmingham,

Alabama, to Grand Central Station at Memphis, Tennessee. The evidence shows that Haney opened the switch and the interstate passenger Frisco train backed over said switch into Grand Central Station; that Haney's duty after opening the switch was to remain at the switch and close it when the passenger train had passed over. Haney opened the switch but was killed before he closed it. Respondent, Illinois Central Railroad Company, was in possession of and owned Grand Central Station (R. 190), and had a contract with respondent, J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railroad Company for the joint use of Grand Central Station by the Trustees and Illinois Central Railroad Company, under which the Trustees paid the Illinois Central Railroad Company \$187¹/₂ for each passenger car switched into Grand Central Station, which included all of the cars in the Trustees' interstate commerce train, being switched into the station at the time Haney was killed (R. 193). The undisputed evidence at the trial further proved that the Trustees of the Frisco Railroad paid the Illinois Central Railroad 2 12 of Haney's, the deceased's, wages to reimburse it for that amount (R. 19). In addition to this, the Trustees paid the Illinois Central Railroad Company 2 12 of the other two switch tenders' wages, who worked at the same switches which Haney maintained at the time he was killed and also paid 2 12 of the cost of electricity furnished for operation of color signals used at the switches where Haney worked (R. 125-128).

The Interstate Commerce Act itself provides that where any part of an employee's duty directly affects interstate commerce he shall be deemed for the purpose of the Federal Employers' Liability Act an employee of the carrier for whom the employee is furthering the interstate movement.

Chapter 2, Title 45, U. S. Code, Section 51, in its title provides for the liability of carriers for injuries to em-

ployees and defines "employees." This section of the Act reads, in part, as follows:

"Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * *."

The definition of employee continues in the words of the Act in the second paragraph as follows:

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter (Apr. 22, 1908, ch. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, ch. 65, Sec. 1, 53 Stat. 1404)."

We therefore believe that it is clear beyond doubt that Haney was employed in interstate commerce at the time of his death by the respondents' railroads.

(1)

Petitioner submits that the evidence adduced at the trial of the cause in the Circuit Court of the City of St. Louis, Missouri, on the issue of respondent's liability under the Employer's Liability Act for the death of their employee, Haney, a switch tender, as for negligence on the part of both respondents as shown by the record of the cause in Division ≈ 1 of the Supreme Court of Missouri filed herewith, amply sufficed to make those issues one for the jury, and that Division ≈ 1 of the Supreme Court of Missouri erred in holding that petitioner was not entitled to have such issues submitted.

At and prior to the time that the deceased was killed, he was on duty as a switch-tender in the railroad yards near Grand Central Station at Memphis, Tennessee. On December 21, 1939, at about 7:30 P. M., Haney, the deceased, in the performance of his duties threw or opened a switch to permit the interstate passenger train of respondent Trustees from Birmingham, Alabama to back over said switch and into Grand Central Station. Haney's duties required him to wait at the switch until the passenger train had cleared and then to close it and return to his shanty or headquarters nearby. When Haney closed the switch it would change a signal light over the switch from red to blue and permit other trains and engines to use the crossing. After the passenger train cleared the switch, the light remained red and the switch opened. On investigation, Haney was found lying face down about five feet north of the north rail of the track over which the train had just passed (R. 216) with his head pointing in the general direction in which the train had just backed in. Haney did not close the switch as it was his duty to do. Haney's only injury was a bruise in the back of the head which caused a fractured skull from which he died, and bruises on his face where it struck the ground (R. 281). Dr. Turner, who examined and assisted in performing an autopsy on Haney's body, testified that the wound on the back of Haney's head was such as would be caused by a round, fast-moving object, which could have been a rod attached to the side of a train backing 8 or 10 miles an hour. Engineer Mee testified that the 12-car passenger train backed in at the rate of 8 or 10 miles an hour (R. 285-287). Witness Gates, another switch-tender working at the next crossing west of Haney, testified that he picked up Haney's white cap after the body was found and that it had a dark mark about an inch and a half long and an inch wide, which ran at an angle across the outside of the back of the cap, which mark corresponded

to the wound on Haney's head (R. 204-205). It was further shown that a Frisco mail car was in the train coupled near the engine (R. 149); that this mail car had a mail hook on both sides of the car, fastened at the top (R. 73), hanging down loose on the outside, with a knob on the bottom, and when at rest was 80 inches above the bottom of the rail (R. 97), which was 7 inches high (R. 97). The knob on the lower end of the mail hook when hanging straight down was, therefore, 73 inches above the top of the rail. The evidence showed that when this mail car swayed or moved around a curve, the mail hooks would pivot and swing out from the side of the car from 14 inches to 3 feet (R. 97, 98, 269). The train was moving around a bad curve at the time Haney was killed (R. 150). There were mounds or piles of cinders near the track where Haney's body was found which were from 18 inches to 2 feet above the top of the rail (R. 267, 298, 300). Haney, the deceased, was shown to be 5 feet 7½ inches tall. He stood 67½ inches from the ground. The mail hook could have, therefore, struck Haney in the back of the head.

One witness testified Haney's body was 5 or 5½ feet north of the track (R. 216). Alvin Haney, the deceased's son, testified he found a spot of blood 6 or 8 inches across, 3 or 4 feet north of the north rail of the track, upon which the train had backed in (R. 93). It was shown that passenger trains such as the one in question have an overhang to the side of the train of 2½ feet (R. 206). Drashman, an employee of the Trustees respondents, testified that he came to the switch a few minutes after Haney's body was found and while it was still lying face down and before it had been turned over, and that a man whom he took to be an Illinois Central switchman, standing at the scene of the accident at the time, stated, "Something sticking out from that train hit Haney" (R. 242, 243, 255). This witness, who was an employee of the defend-

ant trustees, showed by his attitude that he was hostile and made several different statements as to what the switchman had said at the scene of the accident and as to what he saw and heard.

Haney's clothes were not disarranged; there was no evidence of a struggle or fight and no rods, pipes or weapons of any kind were found near the scene of the accident, except Haney's own pistol, which had slipped out of his pocket and was found lying under his body when it was turned over (R. 212). It is therefore clear that the mail hook struck Haney in the back of the head. The jury so found (R. 32, 114).

The Missouri Supreme Court's opinion found that a mail hook could have struck Haney, but that it didn't. *Lavender v. Kurn*, 189 S. W. 2d 253, 1 c. 255 (R. 331). The opinion states:

"It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches."

The Missouri Supreme Court's opinion seeks to justify its conclusion that there wasn't sufficient evidence to submit the case to the jury as to the trustees on the theory that something protruding from the side of the train struck and killed Haney, by several different alleged reasons.

First, the opinion states that Haney was seen to go to the south side of the track after he opened the switch for the train to back in and that the trustees' conductor Creagh testified that he saw Haney go to the south side of the track. This was contradicted by the deceased's widow. Witness Creagh testified that it was so dark at the switch that he could not see how Haney was dressed 10 feet away (R. 144).

Mrs. Haney, widow of the deceased, testified that she had heard that Creagh, the conductor, was claiming that her husband, the deceased, went to the south side of the track after he had opened the switch and that she called upon witness Creagh after her husband was killed and asked him if he knew anything about how her husband was killed; that Creagh told her his memory wasn't good and that he didn't remember anything about her husband going to the south side of the track; that he didn't know where he was standing or anything about it (R. 159). The opinion states that according to Rule 104, Haney was supposed to go to the south side of the track after he had opened the switch. This statement overlooks the positive testimony of switch-tender Arnold, an employee of the Illinois Central Railroad Company, on duty at the next crossing north of Haney at the time he was killed, in which he testified that it was Haney's duty after he had opened the switch to "Just stand there and wait till the train got back" and "close it as soon as it cleared" (R. 219), and the testimony of Brusio, employee and witness of the Illinois Central Railroad, who testified (R. 305):

"Q. His duty was to open the switch and remain there until the train backed in, and then go to his shanty? A. Yes, sir.

Q. That is the custom, isn't it? A. Yes, sir."

The opinion also erroneously finds that Haney's body was lying with the head toward the track and the legs extending north at right angles to the track as a reason why the mail hook didn't strike Haney. In this conclusion, the opinion overlooks the testimony of witness Bundy, another employee of one of the respondents, to the effect that Haney's head was pointing southeast (R. 213).

"Q. His head was pointing, as you say, southeast? A. Yes, sir.

Q. And this train, Frisco train, had just backed east and turned north? A. Yes, sir.

Q. Into the station? A. Yes, sir.

Witness Drashman, the hostile witness employee of one of the respondents, testified that Haney's body was lying parallel to the track over which the train had just backed (R. 264).

The opinion assumes that the statement made by the Illinois Central switchman to Drashman was made in sufficient time to be competent under the res gestae rule, but the opinion later erroneously states that the switchman said that Haney was supposed to have been struck by something protruding from the side of the train. Drashman, respondent's employee, made several contradictory statements and the trial court permitted counsel to cross-examine or lead him as a hostile witness (R. 44). In the cross-examination as to what the switchman said and when his testimony and deposition was read, witness Drashman testified (R. 242):

"Q. The next question: 'Q. That is, someone told you at the scene of the accident? A. No, he didn't see the accident, I heard someone say that is what happened.' Did you so testify? A. Yes."

Q. And that is true, isn't it? A. Yes, sir.

By the Court: Now, do you want to explain your answer?

By the Witness: Yes, sir. * * *

By Mr. Edwards: Explain any answer you want to."

But respondent's counsel refused to permit the witness to explain (R. 243).

Again Witness Drashman testified on re-examination (R. 255):

"Redirect Examination, By Mr. Edwards.

"Q. Mr. Drashman, you said on direct examination that this statement about this thing sticking out from

the train hitting Haney was made by an Illinois Central switchman, don't you remember telling me that?

A. I suppose it was a switchman, I don't know who it was. . . .

Q. You said a moment ago that the man who made the statement that something sticking out from the train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.

Q. That is true, isn't it? A. I think so; no one else was around there but I. C. men at that time."

The opinion holds that the statement made by the Illinois Central switchman was made in time and under the proper circumstances, but concludes that it was based on hearsay, and therefore incompetent. This is not the correct rule.

Rosenzweig v. Wells, 308 Mo. 617, 273 S. W. 1951;
Johnson v. Southern Ry. Co., 351 Mo. 1119, 173
S. W. 2d 802.

(2)

Petitioner submits that the evidence adduced at the trial of the cause in the City of St. Louis, Missouri, on the issue of respondent, Illinois Central Railroad Company's liability for failing to furnish Haney, its employee, with a reasonably safe place to work was amply sufficient to make that issue one for the jury, and Division No. 1 of the Supreme Court of Missouri erred in holding that petitioner was not entitled to have such issue submitted to the jury. The evidence showed that at the switch and the place where deceased was required to work the ground was hard and uneven with piles of cinders both east and west of the switch (R. 267, 298 and 305). In some instances the cinder piles and mounds were from 18 inches to 2 feet from the rails. There was no artificial light near the switch at all. It was about 7:30 P. M. at night time. It was dark at the place.

Witness Creagh, one of respondents' employees and witnesses, testified it was so dark at the switch that he could not tell how a man was dressed 10 feet away (R. 144). Witness Mee, respondents' employe and witness and engineer in charge of the passenger train, testified it was so dark he could not see a 2½-inch pipe 50 feet away (R. 311). Alvin Haney testified it was so dark that he could not see a 3-inch pipe 25 feet away (R. 317), and that the ground was rough and uneven and from 18 inches to 2 feet above the rail where he found a spot of blood 3 or 4 feet north of the track (R. 93). The evidence was undisputed as to the lack of light. Respondents claim there was no need of any artificial light, but they erected an electric light over the switch after Haney was killed (R. 27, 309). Under the evidence, it was clear that Haney could not see or be seen at the switch for any distance. Under plaintiff's instruction No. 4, which submitted the case as against respondent Illinois Central Railroad Company, the jury were required to find that the ground was high and uneven, the light was inadequate and insufficient, and the place was unsafe and dangerous, and that Haney was injured by reason of the place being unsafe and dangerous before they could find for plaintiff under this instruction. The instruction did not require the jury to find that a mail hook struck Haney. No objection has been made to the instruction on appeal. The Supreme Court's opinion near the end, in four lines, takes away petitioner's right to trial by jury and decides the question of fact against the petitioner in these words (R. 331). *Lavender v. Kurn*, 189 S. W. 253, 1 c. 259:

* And we also rule that there was no substantial evidence ~~that the uneven ground and insufficient light were causes or contributing causes of the death of Haney.~~

By this cryptic clause the State Supreme Court's opinion decided a question of fact contrary to the jury's finding.

The jury had found under plaintiff's instruction No. 4 that only that the place was unsafe and dangerous, but they found that the unsafe and dangerous place was the proximate cause of the injury and death of Haney. The Supreme Court of Missouri usurped the power of the jury in deciding the question of the proximate cause of Haney's death and reversed the jury's verdict and finding on that question. The State Supreme Court therefore deprived your petitioner and the dependents of Haney of their constitutional right of trial by jury.

(3)

The ruling of the Supreme Court of Missouri, Division ~~=~~1, that in this case no substantial evidence was adduced to warrant the submission of the case to the jury on the hypothesis that something protruding from the side of the passenger train struck Haney and that respondent Illinois Central Railroad Company negligently failed to furnish him with a safe place to work which resulted in his death, but that to submit the case on those theories, would invite a verdict based on conjecture and speculation, is plainly out of accord with the applicable decisions of this Court.

It is the well-settled rule of this Court that, on the question whether a case is made entitling the plaintiff to the judgment of a jury, the evidence is to be viewed in the light most favorable to the plaintiff, and the plaintiff is to be accorded the benefit of every inference favorable to him that may fairly and reasonably be deduced therefrom; that it is the province of the jury to resolve any conflicts in the evidence and to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on the issue of liability, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, the question is not one of law for the Court but one of fact for the jury.

Meyers v. Pittsburgh Coal Co., 233 U. S. 184, 1. c. 192, 193, 58 L. Ed. 906;

New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892;

Jenkins v. Kurn, 313 F. S. 256, 61 Sup. Ct. 934;

Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 527, 69 L. Ed. 419;

Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473;

Hayes v. Michigan Central R. Co., 111 U. S. 228, 28 L. Ed. 410, 1. c. 415.

The principles here applicable have been stated and applied by this Court in a long line of decisions from the time of Chief Justice Marshall (*Pawling v. United States*, 4 Cranch. 219, 2 L. Ed. 601). But in the instant case the state court failed to apply such principles to the facts of this record. We mean no disrespect to the state court when we say that it rendered lip service to the rule that where uncertainty arises from a conflict in the testimony, or if fair-minded men may honestly draw different conclusions from the evidence, the case is one for the jury (R. 331), but inadvertently failed to realize that a proper application thereof to the evidence in this record would compel a holding that the case was one for the jury.

The Missouri Supreme Court first found that it could be inferred that the mail hook struck Haney as alleged in plaintiff's petition and found by the jury. It then searches the record for bits of evidence, which are contradicted by plaintiff's evidence, and finds this contradictory evidence to be true as a matter of fact. For example, the opinion indicates that it finds that Haney after throwing the switch went to the south side of the track. The opinion states that Creagh, respondent's witness, so testified and that Rule 104 provides that Haney should go to the south side of the track. The opinion fails to state or consider the testimony of Mrs. Haney to the effect that

Creagh told her that he didn't know anything about where Haney went; that he didn't know where he was standing, and that his memory was bad. The witness testified that he could not see how Haney was dressed ten feet away. The application of Rule ~~104~~ that Haney should have gone to the south side of the track is disputed by witnesses Arnold and Brusio, employees of the respondents, who stated that it was Haney's duty after opening the switch to remain at the switch and close it as soon as the train had cleared. The State Court refused to correct its opinion on petitioner's motion to modify. The opinion also asserts that Haney's body was lying at right angles to the track. It ignores other testimony that the body was lying with the head pointing in the direction which the train had backed. The opinion also rules out the important testimony of one of respondent's employees, Drashman, in which he stated that one of respondent's, Illinois Central's, switchmen at the scene of the accident, a few minutes after the body had been found, stated that something sticking out from that train hit Haney. The opinion fails to state the issue or to properly decide the case on petitioner's right to recover against the Illinois Central Railroad Company for failing to furnish Haney a safe place to work. It simply states and rules that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney. By this ruling the State Supreme Court decided a question of proximate cause against petitioner, when under the law this is a question of fact for the jury and should be left to the jury's finding.

In a suit under the Federal Employers' Liability Act to recover for the death of an employee there was evidence from which the jury could reasonably infer that failure to ring the bell before starting the locomotive was negligence of the defendant, and that that negligence was

the proximate cause of the death; and a judgment for the defendant notwithstanding a verdict for the plaintiff deprived the latter of the right to trial by jury. P. 33.

An appellate court is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because the court regards another result as more reasonable. P. 35.

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, this Court said, I. c. 35:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. * * *

"Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In the case of Sengo v. New York Central Railroad Company, 315 U. S. 781, 62 Sup. Ct. Rep. 806, this court by memorandum opinion reversed the Missouri Supreme Court in an opinion written at 155 S. W. 2d 126. In a Federal Employers' Liability case, the Missouri Supreme Court, as it has in the case at bar, held that there was not sufficient evidence to take the case to the jury on the theory that no hand lantern back up signal had been given before the train was started, and gave a similar reason as in the case at bar, in that to have held that the case was properly submitted to the jury would permit a verdict to have stood on conjecture and speculation.

In *New York Central R. Co. v. Marcone*, 281 U. S. 345, 74 L. Ed. 892, the deceased employee, employed in the defendant's roundhouse, was run over and killed by an engine while it was being backed out of the roundhouse. There was no eyewitness to the accident. Despite uncontradicted testimony that the whistle was sounded a few minutes before the engine began to move, as a warning that it was to be backed out of the roundhouse, this Court held that from the evidence as a whole and the inferences that might be drawn therefrom reasonable men could with propriety conclude that the defendant was negligent in failing to take reasonable precautions to avert such a casualty.

In the recent case of *Jenkins v. Kurn*, 313 U. S. 256, 61 Sup. Ct. Rep. 934, the plaintiff was a fireman on a moving train. As the train emerged from a curve he observed a train standing not more than six hundred feet ahead on the same track and shouted to the engineer to push the brake valve over in emergency. The engineer turned and looked at the plaintiff but did nothing to arrest the movement of the train until the engine was but two or three car lengths from the standing train, at which moment plaintiff leaped from the engine and was injured. The engineer was killed. Division No. 1 of the Supreme Court of Missouri held that no case was made for the jury and reversed the judgment below on the ground that there was "Not even a scintilla of evidence that the engineer understood what plaintiff said" (*Jenkins v. Kurn*, 144 S. W. [2d] 76, 1 c. 79).

It happens that the opinions in both the *Jenkins* and *Seago* cases were written by the same Commissioner who wrote the opinion in the instant case. This Court reversed the opinion and judgments in both the *Jenkins* and the *Seago* cases on the ground that the Missouri Supreme Court erred in holding that the cases should not have been submitted to the Jury.

In the Jenkins case the state court failed to reckon with the inferences that arose from the plaintiff's testimony that he "hollered" his warning loudly, that only a narrow space separated him from the engineer, that the engineer's hearing was "all right," that the plaintiff and the engineer could and did carry on "normal conversations" while the train was operating, and that there was comparatively little noise in the cab from the train. The court granted certiorari, and upon a review of the case held that the evidence was ample to warrant the submission of the issue of the engineer's negligence to the jury and reversed the judgment of Division No. 1 of the Supreme Court of Missouri therein (*Jenkins v. Kurn*, 313 U. S. 256). By the same token the judgment of the state court in the instant case should be reversed.

(4)

The opinion of the Supreme Court of Missouri, in holding and deciding that there was not sufficient evidence to submit the question of the Illinois Central Railroad Company's liability to petitioner for failing to furnish Haney, its employee, a reasonably safe place to work, is in direct conflict with the decisions and holdings of this Court. In the case of *Choctaw, Oklahoma R. R. Company v. McDade*, 191 U. S. 64, this Court held that it is the duty of a Railroad Company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ. It is obliged to use the same degree of care to provide properly constructed road bed structures and track to be used in the operation of the railroad. The respondent Illinois Central Railroad Company, therefore, under the holding of this court, was charged with the duty to use due care to provide a reasonably safe place for Haney to work. It did not provide such a place and Haney was killed by reason thereof. The

jury so found. The Missouri Supreme Court erred in holding to the contrary and its opinion is in conflict with this Court's decisions on that question.

Where workmen are engaged in a hazardous occupation, such as underground mining, it is the duty of the master to exercise reasonable care for their safety, and not to expose them to injury by use of dangerous appliances or unsafe places to work, when such appliances and places can, by the exercise of due care, be made reasonably safe.

Myers v. Pittsburgh Coal Co., 233 U. S. 184, 1. c. 191.

"The trial court submitted the case to the jury to determine whether the defendant had failed to discharge its duty of using reasonable care to provide a proper and safe place for Myers to work, that is, in failing to provide adequate lights at a dangerous place and permitting the motor car to be operated without the headlight, and also in permitting an exposed live trolley wire to cross the main track at the sufficient elevation. An inspection of the record satisfies us that there was testimony enough in the case to carry these questions to the jury under the instructions which were given. The duty of the master to use reasonable diligence to provide a safe place for the employes to work, to carry on the occupation in which they are employed is too well settled to require much consideration now. This duty is a continuing one and discharged only when the master provides and maintains a place of that character. *Baltimore & Potomac R. R. Co. v. Mackey*, 157 U. S. 72, 87; *Union Pacific Ry. Co. v. O'Brien*, 161 U. S. 45; *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64; *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 255. Under the case made, the jury might well have found that the overhead wire was hung too low for the safety of the men; that there was want of adequate light at this place, and that it was negligence to run the motor car into such a place without the

light which it was its duty to provide. Where workmen are engaged in such mines in occupations more or less hazardous, it is the duty of the master to exercise reasonable care for their safety and not to expose them to injury by use of dangerous appliances or unsafe places to work, when the exercise of due skill and care will make the appliances and places reasonably safe. *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, supra, 66; *Kreigh v. Westinghouse & Co.*, supra, 256."

Under both the federal rule and the ~~state~~ rule whether there was evidence to warrant the submission of the issue of the engineer's negligence was a matter to be determined on appeal by a consideration of all the evidence material to that issue. *Western Atlantic R. Co. v. Hughes*, 278 U. S. 496, 73 L. Ed. 473; *Stauffer v. Metropolitan Street Ry. Co.*, 243 Mo. 305, 316; *Lorton v. Mo. Pac. R. Co.*, 306 Mo. 125, 137. The state court failed to observe the rule.

(5)

This court, on certiorari, is not confined to a consideration of the evidence stated by the state court in its opinion, but will review the entire record and determine for itself whether the evidence sufficed to take to the jury the issue of negligence; whether petitioner was denied a federal right by the opinion and judgment of the state court. *Great Northern Ry. Co. v. State of Washington*, 300 U. S. 154, 81 L. Ed. 573; *United Gas Public Service Co. v. State of Texas*, 303 U. S. 125, 143, 82 L. Ed. 702; *Chicago Great Western R. Co. v. Rambo*, 298 U. S. 99.

Petitioner, therefore, prays that this court issue its writ of certiorari herein, and that the judgment of Division No. 4 of the Supreme Court of Missouri, rendered herein on the 4th day of June, 1945, and which became final on the

2nd day of July, 1945, by the overruling of petitioner's motion for a rehearing and to transfer the cause to the Court in Banc, be reversed.

Respectfully submitted,

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CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator
de bonis non of the Estate of L. E.
Haney, Deceased,

Petitioner,

vs.

J. M. KURN et al., Trustees of ST.
LOUIS-SAN FRANCISCO RAILWAY
COMPANY, Debtor, and ILLINOIS
CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.

On Writ of Certiorari to the Supreme Court
of the State of Missouri.

BRIEF OF PETITIONER.

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St. Louis, Missouri,

✓ JAMES A. WAECHTER,
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(3) The ruling of the Supreme Court of Missouri, Division No. 1, that in this case no substantial evidence was adduced to warrant the submission of the case to the jury on the hypothesis that something protruding from the side of the passenger train struck Haney and that respondent Illinois Central Railroad Company negligently failed to furnish him with a safe place to work which resulted in his death, but that to submit the case on those theories would invite a verdict based on conjecture and speculation, is plainly out of accord with the applicable decisions of this Court.....	20
(4) The opinion of the Supreme Court of Missouri, in holding and deciding that there was not sufficient evidence to submit the question of the Illinois Central Railroad Company's liability to petitioner for failing to furnish Haney, its employee, a reasonably safe place to work, is in direct conflict with the decisions and holdings of this Court	26
(5) This Court, on certiorari, is not confined to a consideration of the evidence stated by the state court in its opinion, but will review the entire record and determine for itself whether the evidence sufficed to take to the jury the issue of negligence; whether petitioner was denied a federal right by the opinion and judgment of the state court.....	38
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator
de bonis non of the Estate of L. E.
Haney, Deceased,

Petitioner,

vs.

J. M. KURN et al., Trustees of ST.
LOUIS-SAN FRANCISCO RAILWAY
COMPANY, Debtor, and ILLINOIS
CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.

On Writ of Certiorari to the Supreme Court
of the State of Missouri.

BRIEF OF PETITIONER.

This case is here pending upon writ of certiorari awarded by this court on the third day of December, 1945, to review a final judgment and opinion of Division No. 1 of the Supreme Court of Missouri, entered on June 4, 1945 (R. 320), reversing a \$30,000 judgment in favor of petitioner and against respondents, and in which case a motion for a rehearing and to transfer the cause to the Supreme Court of Missouri in banc was filed and entertained and denied on July 2, 1945 (R. 368), at which

time said judgment became final. Upon application of your petitioner this Honorable Court on September 24, 1945, entered its order that the time for filing a petition for a writ of certiorari in this cause be and the same was ordered extended to and including November 2, 1945. The petition for a writ of certiorari was filed in this Court on October 26, 1945.

OPINION OF THE COURT BELOW.

The opinion of Division No. 1 of the Supreme Court of Missouri in said cause of Walter A. Lavender, Administrator de bonis non of the Estate of L. E. Haney, Deceased (Plaintiff), Respondent, v. J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company (Defendants), Appellants, which petitioner here seeks to have reviewed, is reported in 189 S. W. 2nd, at page 253, and appears on pages 320 to 331 of the transcript of the printed record filed herein.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 237 of the Judicial Code as amended and reformulated by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 937, Title 28, U. S. C. A., sec. 344, providing that it shall be competent for this Court, by certiorari, to require that there be certified to it for review and determination any cause wherein a final judgment or decree has been rendered by the highest court of a state in which a decision could be had where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute, of, or commission held or authority exercised under, the United States.

The judgment of the Supreme Court of Missouri, Divi-

sion No. 1, sought to be reviewed was originally entered on June 4, 1945 (R. 320). A motion for a rehearing and to transfer said cause from Division No. 1 to the Missouri Supreme Court in banc was filed on June 18, 1945, within the time provided by the rules of the Supreme Court of Missouri (R. 332), and said motion of petitioner for a rehearing and to transfer said cause to the Missouri Supreme Court in banc was denied by said Division No. 1 of the Supreme Court of Missouri on July 2, 1945, which is the date on which the judgment of said Division No. 1 of the Supreme Court of Missouri in said cause became final. Division No. 1 of the Supreme Court of Missouri, upon its refusal to grant a rehearing and to transfer the cause to the Court in banc, was the highest Court of the State in which a decision could be had in said cause; and in said cause, petitioner specially set up and claimed a right under a statute of the United States, namely, the Employers' Liability Act, 45 U. S. C. A., sec. 51, Act of April 22, 1908, c. 149, sec. 8, 35 Stat. 65 (R. 2-6). Which right was denied petitioner by said Supreme Court of Missouri, Division No. 1.

Cases which sustain the jurisdiction of this Court are:

- Seago v. New York Central R. Co., 315 U. S. 781,
62 Sup. Ct. Rep. 806;
- Jenkins v. Kurn, 313 U. S. 256, 61 Sup. Ct. Rep. 934;
- New York Central R. Co. v. Marcone, 281 U. S. 345;
- Puget Sound Power & Light Co. v. County of King,
264 U. S. 22.

STATEMENT OF THE CASE.

Pleadings in the State Court.

Petitioner in the State court charged that L. E. Haney, the deceased, and the respondent, Railroads, were all engaged in interstate commerce between the State of Alabama and the State of Tennessee at the time the decedent was injured and killed.

Petitioner's third amended petition and complaint, upon which this cause was tried in the state court, charged that L. E. Haney was employed by the defendants as a switch-tender in throwing, setting and regulating switches for railroad cars and trains in the switchyard of the Grand Central Station at Memphis, Tennessee, on and before December 21, 1939; that he was ordered, directed and required by the defendants to throw or open a switch so that defendant trustees could back an interstate Frisco passenger train from Birmingham, Alabama, into the Grand Central Station at Memphis, Tennessee; that the said L. E. Haney did in performance of his duty and as a servant of defendants on said last mentioned date, open a switch and that defendants' trustees did back a long interstate Frisco passenger train over the track and switch which said Haney had opened past the place where Haney was standing near said switch, and that as said interstate passenger train backed past Haney, defendant trustees negligently caused, suffered and permitted a rod, stick or other object to project out or swing out from the side of the said Frisco passenger train and to strike said Haney, knocking him to the ground and injuring him so severely that he died as a direct result of said injuries on the 21st day of December, 1939.

Petitioner's complaint against defendant Illinois Central Railroad Company charged that said Railroad Company was the employer of L. E. Haney, the deceased, and

gently failed to furnish Haney with a reasonably safe place to work, in that the ground where he was required to work was high and uneven and the light insufficient and inadequate and that the backing train had an object or rod sticking or swinging out to the side as it passed Haney, and that said place was unsafe and dangerous. Respondent railroads in the State Court filed separate answers to petitioner's third amended petition, which were general denials (R. 8).

The Evidence.

The evidence shows that L. E. Haney died on December 21, 1939, at Memphis, Tennessee, as a result of injuries suffered on that date in the Railroad yards of the Grand Central Station at Memphis, Tennessee, and upon his death left surviving him his widow, Mrs. Julia Haney, and two children, a son and a daughter; that your petitioner was thereafter appointed administrator de bonis non of the Estate of said L. E. Haney, deceased, and was thereafter named as plaintiff in the State Court.

The undisputed evidence in the record is that L. E. Haney was a switch tender working at the duties assigned to him at the time he was injured and killed on December 21, 1939, in the railroad yards near the Grand Central Station at Memphis, Tennessee. The evidence further shows it was Haney's duty to open the switch for the respondent Trustee's interstate passenger train on its regular run from Birmingham, Alabama, to the Grand Central Station at Memphis, Tennessee.

The evidence shows that Haney opened the switch and the interstate passenger Frisco train backed over said switch into Grand Central Station; that Haney's duty after opening the switch was to remain at the switch and close it when the passenger train had passed over (R. 219, 265). Haney opened the switch, but was killed before he closed it. Respondent, Illinois Central Railroad Company,

was in possession of and owned Grand Central Station (R. 190), and had a contract with Respondent, J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company for the joint use of Grand Central Station by the Trustees and Illinois Central Railroad Company, under which the Trustees paid the Illinois Central Railroad Company \$1.87 1/2 for each passenger car switched into Grand Central Station, which included all of the cars in the Trustees' interstate commerce train being switched into the station at the time Haney was killed (R. 193). The undisputed evidence at the trial further proved that the Trustees of the Frisco Railroad paid the Illinois Central Railroad 2/12 of Haney's, the deceased's, wages to reimburse it for that amount (R. 19). In addition to this, the Trustees paid the Illinois Central Railroad Company 2/12 of the other two switch tenders' wages, who worked at the same switches which Haney maintained at the time he was killed, and also paid 2/12 of the cost of electricity furnished for operation of color signals used at the switches where Haney worked (R. 125-128).

At and prior to the time that the deceased was killed, he was on duty as a switch-tender in the railroad yards near Grand Central Station at Memphis, Tennessee. On December 21, 1939, at about 7:30 P. M., Haney, the deceased, in the performance of his duties threw or opened a switch to permit the interstate passenger train of respondent Trustees from Birmingham, Alabama, to back over said switch and into Grand Central Station. Haney's duties required him to wait at the switch until the passenger train had cleared and then to close it and return to his shanty or headquarters near by (R. 219, 305). When Haney closed the switch it would change a signal light over the switch from red to blue and permit other trains and engines to use the crossing. After the passenger train cleared the switch, the light remained red and the switch opened. On investigation, Haney was found lying face down about five

feet north of the north rail of the track over which the train had just passed (R. 216) with his head pointing in the general direction in which the train had just backed in. Haney did not close the switch as it was his duty to do. Haney's only injury was a bruise in the back of the head which caused a fractured skull from which he died, and bruises on his face where it struck the ground (R. 281). Dr. Turner, who examined and assisted in performing an autopsy on Haney's body, testified that the wound on the back of Haney's head was such as would be caused by a round, fast-moving object, which could have been a rod attached to the side of a train backing 8 or 10 miles an hour (R. 285-286). Engineer Mee testified that the 12-car passenger train backed into the station at the rate of 8 or 10 miles an hour (R. 285-287). Witness Gates, another switch-tender working at the next crossing west of Haney, testified that he picked up Haney's white cap after the body was found and that it had a dark mark about an inch and a half long and an inch wide, which ran at an angle across the outside of the back of the cap, which mark corresponded to the wound on Haney's head (R. 204-205). It was further shown that a Frisco mail car was in the train coupled near the engine (R. 149); that this mail car had a mail hook on both sides of the car, fastened at the top (R. 73), hanging down loose on the outside, with a knob on the bottom, and when at rest was 80 inches above the bottom of the rail (R. 97), which was 7 inches high (R. 97). The knob on the lower end of the mail hook when hanging straight down was, therefore, 73 inches above the top of the rail. The evidence showed that when this mail car swayed or moved around a curve, the mail hooks would pivot and swing out from the side of the car from 12 inches to 3 feet (R. 97, 98, 269). The train was moving around a bad curve at the time Haney was killed (R. 150). There were mounds or piles of cinders near the track where Haney's body was found which were from 18 inches

to 2 feet above the top of the rail (R. 267, 298, 360). Haney, the deceased, was shown to be 5 feet 7 $\frac{1}{2}$ inches tall. He stood 67 $\frac{1}{2}$ inches from the ground. The mail hook could have, therefore, struck Haney in the back of the head.

One witness testified Haney's body was 5 or 5 $\frac{1}{2}$ feet north of the track (R. 216). Alvin Haney, the deceased's son, testified he found a spot of blood 6 or 8 inches across, 3 or 4 feet north of the north rail of the track, upon which the train had backed in (R. 93). It was shown that passenger trains such as the one in question have an overhang to the side of the train of 21 $\frac{1}{2}$ feet (R. 206). Drashman, an employee of the Trustees respondents, testified that he came to the switch a few minutes after Haney's body was found and while it was still lying face down and before it had been turned over, and that a man whom he took to be an Illinois Central switchman, standing at the scene of the accident at the time, stated, "Something sticking out from that train hit Haney" (R. 242, 243, 255, 271). This witness, who was an employe of the defendant trustees, showed by his attitude that he was hostile and made several different statements as to what the switchman had said at the scene of the accident and as to what he saw and heard.

Haney's clothes were not disarranged; there was no evidence of a struggle or fight and no rods, pipes or weapons of any kind were found near the scene of the accident (R. 211), except Haney's own pistol, which had slipped out of his pocket and was found lying under his body when it was turned over (R. 32, 114, 212). It is therefore clear that the mail hook struck Haney in the back of the head. The jury so found (R. 164-165).

Arnold, a switchtender and employee of the Illinois Central Railroad, testified that he was on duty at the next crossing north of Haney at the time he was killed. He

testified that it was Haney's duty after he had opened the switch to, "Just stand there and wait till the train got back" and "close it as soon as it cleared" (R. 219). Witness Brusio, an employee and witness of the Illinois Central Railroad, testified as to Haney (R. 305):

"Q. His duty was to open the switch and remain there until the train backed in, and then to go to his shanty? A. Yes, sir.

Q. That is the custom, isn't it? A. Yes, sir."

Witness Bundy, another employee of one of the respondents, testified that when they first found Haney's body after the accident, it was lying just north of the track with the head pointing southwest (R. 213).

"Q. His head was pointing, as you say, southwest? A. Yes, sir.

Q. And this train, Frisco train, had just backed east and north? A. Yes, sir.

Q. Into the station? A. Yes, sir."

Witness Drashman, a hostile witness, employee of one of the respondents, testified that Haney's body was lying parallel to the track over which the train had just backed (R. 264). Drashman made several statements contradictory to his deposition on file and the trial court permitted counsel for petitioner to cross-examine or lead him as a hostile witness (R. 41). In the cross-examination as to the statement made by a switchman immediately after Haney's body was found at the Frisco switch, witness Drashman testified (R. 242):

"Q. The next question: 'Q. That is, someone told you at the scene of the accident? A. No, he didn't see the accident. I heard someone say that is what happened.' Did you so testify? A. Yes.

Q. And that is true, isn't it? A. Yes, sir.

By the Court: Now, do you want to explain your answer?

By the Witness: Yes, sir. . . .

By Mr. Edwards: Explain any answer you want to."

But respondent's counsel refused to permit the witness to explain (R. 243).

Again witness Drashman testified (R. 255):

"Redirect Examination, by Mr. Edwards.

Q. Mr. Dashman, you said on direct examination that this statement about this thing sticking out from the train hitting Haney was made by an Illinois Central switchman, don't you remember telling me that?
A. I suppose it was a switchman, I don't know who it was. . . .

Q. You said a moment ago that the man who made the statement that something sticking out from the train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.

Q. That is true, isn't it? A. I think so; no one else was around there but I. C. men at that time."

The evidence as to the Illinois Central Railroad Company's negligent failure to furnish Haney, its employee, with a reasonably safe place to work and that they furnished him with a dangerous place to work is that the evidence showed that at the switch and the place where Haney was required to work, the ground was high and uneven with piles of cinders both east and west of the switch (R. 267, 298 and 305). In some instances these cinder piles and mounds were from 18 inches to 2 feet above the rails. There was no artificial light near the switch at all. It was about 7:30 P. M. at nighttime. It was dark at the place.

Witness Creagh, one of respondents' employees and witnesses, testified it was so dark at the switch that he could not tell how a man was dressed 10 feet away (R. 144). Witness Mee, respondents' employee and witness and engineer in charge of the passenger train, testified it was so dark he could not see a 2½-inch pipe 50 feet away (R. 311). Alvin Haney testified it was so dark that he could not see a 3-inch pipe 25 feet away (R. 317), and that the ground was rough and uneven and from 18 inches to 2 feet above the rail where he found a spot of blood 3 or 4 feet north of the track (R. 93). The evidence was undisputed as to the lack of light. Respondents claim there was no need of any artificial light, but they erected an electric light over the switch after Haney was killed (R. 27, 309). Under the evidence, it was clear that Haney could not see or be seen at the switch for any distance. Under plaintiff's instruction No. 4, which submitted the case as against respondent Illinois Central Railroad Company, the jury were required to find that the ground was high and uneven, the light was inadequate and insufficient, and the place was unsafe and dangerous, and that Haney was injured by reason of the place being unsafe and dangerous before they would find for plaintiff under this instruction. The instruction did not require the jury to find that a mail hook struck Haney. No objection has been made to the instruction on appeal.

The Proceedings in the State Court.

Trial was had before the Court and a jury and resulted in a verdict and judgment in favor of the petitioner in the sum of \$30,000.00 (Thirty Thousand Dollars) against both respondents (R. b).

The Instructions.

Petitioner, the plaintiff in the trial court, submitted his case to the jury as to each of the defendants under separate

instructions. Plaintiff's instruction No. 2 submitted the question of the Liability of defendant trustees of the St. Louis-San Francisco Railway Company for the death of Haney (R. 164-165). It required the jury to find, among other things, that a rod or other object was extending out to the side of the train as it passed Haney and that the defendant was guilty of negligence in permitting the object to swing out and that Haney was killed as a direct result of such negligence, if any. The liability of the Illinois Central Railroad Company was submitted to the jury under plaintiff's instruction No. 4 (R. 166-168). This instruction required the jury to find that the ground where Haney was required to work, was high and uneven and that the light was insufficient and inadequate and that the place was unsafe and dangerous and that the defendant Illinois Central Railroad Company had failed to exercise ordinary care to make said place reasonably safe and that such failure, if any, constituted negligence and that if they found that Haney was injured and killed as a direct result of said place being unsafe and dangerous, then they should find for plaintiff and against the Illinois Central Railroad Company. This instruction did not require the jury to find that Haney was killed by something sticking out from the side of the passing train. No complaint was made against the correctness of this instruction on appeal in the Missouri Supreme Court.

The Verdict and Judgment.

The case was submitted to the jury as to each of the defendants on the above-mentioned instructions and on a measure of damage instruction. The jury returned a verdict against both defendants in favor of petitioner for \$30,000.00. A judgment was entered in the trial court against defendants in favor of petitioner for the sum of \$30,000.00 and costs. Both defendants filed motions for a

new trial and the trial court overruled said motions. Thereafter, the defendants were allowed separate appeals to the Supreme Court of Missouri. Respondents herein, as appellants in the State Court, duly perfected their separate appeals from said judgment in favor of petitioner in said cause, and said cause was briefed, argued and submitted in Division No. 1 of said Supreme Court on May 1, 1945 (R. 320). Thereafter, on June 4, 1945, said Division No. 1 of said Supreme Court of Missouri, in an opinion filed in said cause on said day (R. 320), ruled that there was no substantial evidence to support the submission of the case to a jury under the hypothesis that a mail hook struck Haney, the deceased. The opinion further held that a mail hook could have struck Haney but that it did not. The opinion also held that the testimony of witness Drashman as to the statement made to him by an Illinois Central switchman a few minutes after Haney's body was found at the scene of the accident, that Haney had been struck by something protruding from the side of the train, was not competent under the res gestae rule, and that there was not sufficient evidence to submit the question of whether something sticking out from the Frisco interstate passenger train struck Haney, and that there was not sufficient evidence that the insufficient light and high and uneven ground and unsafe and dangerous place to work in whole or in part caused or contributed to cause the injury and death of Haney. The Missouri Supreme Court in its opinion held that "it would be mere speculation and conjecture to say that Haney was struck by a mail hook," and further held that all reasonable men in the honest exercise of a fair and impartial judgment would draw the same conclusions from the facts in this case, and it also held that they would not affirm the verdict and judgment for petitioner, because they said that it was based on "conjecture and speculation." The Supreme Court of

Missouri, by its opinion and judgment rendered and entered June 4, 1945, reversed the \$30,000.00 judgment in favor of petitioner.

Opinion of the Supreme Court of Missouri.

Thereafter, on the 18th day of June, 1945, and within the time allowed therefor by the rules of said Supreme Court of Missouri, petitioner duly filed in said cause, in said Division No. 1 of the Supreme Court of Missouri, his motion for a rehearing and to transfer said cause to the court in banc and suggestions in support of said motion, the Highest Court of the State of Missouri under Section 4 of the Amendment of 1890 to Article VI of the Constitution of the State of Missouri, providing that "when a Federal question is involved, the cause, on the application of the losing party, shall be transferred to the Court (in banc) for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the Court (in banc) for its decision."

Thereafter, on the 2nd day of July, 1945, petitioner's said motion for a rehearing and to transfer said cause from said Division No. 1 of the Supreme Court of Missouri to the Court (The Supreme Court of Missouri) in banc, was by Division No. 1 of the said Supreme Court overruled, whereby and on which day said judgment of said Division No. 1 of the Supreme Court of Missouri in said cause, reversing said judgment in favor of petitioner, became final.

Petitioner, prior to July 17, 1945, delivered to the Clerk of the Supreme Court of Missouri his motion to modify the opinion of the Supreme Court of Missouri, in which said motion petitioner asked that said Supreme Court modify its opinion by stating the issues and the facts in accordance with the record, as will more particularly appear in

said motion to modify. The Clerk of the Supreme Court of Missouri refused to file petitioner's said motion to modify. Petitioner thereupon, on July 17, 1945, filed in said cause in the Supreme Court of Missouri, his motion for leave to file said motion to modify the opinion, for the reason that no rule of the Supreme Court of Missouri specifies or provides when a motion to modify an opinion should be filed. Thereafter, on September 4, 1945, the Supreme Court of Missouri entered its order in said cause overruling petitioner's motion for leave to file his motion to modify the opinion and gave as a reason for said ruling that said motion to modify was not filed within the time allowed for filing a motion for rehearing. The Supreme Court of Missouri did on September 11, 1945, on motion of petitioner, order its mandate stayed in said cause.

The Missouri Supreme Court's opinion found that a mail hook could have struck Haney, but that it didn't. *Lavender v. Kurn*, 189 S. W. (2d) 253, 1 c. 255 (R. 331). The Opinion states:

"It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches."

The opinion also erroneously finds that Haney's body was lying with the head toward the track and the feet extending north at right angles to the track as a reason why the mail hook didn't strike Haney. In this conclusion, the opinion overlooks the testimony of witness Bundy, another employee of one of the respondents, to the effect that Haney's head was pointing southeast (R. 213).

The Supreme Court's opinion near the end, in four lines, takes away petitioner's right to trial by jury and decides

the question of fact against the petitioner in these words (R. 331). *Lavender v. Kurn*, 189 S. W. 253, 1. c. 259:

“And we also rule that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney.”

The State Supreme Court's opinion decided a question of fact contrary to the jury's finding.

SPECIFICATION OF ERRORS.

The Supreme Court of Missouri erred in its opinion in this cause in ordering the judgment herein in favor of petitioner reversed under an erroneous finding of the law and facts, under the Employers' Federal Liability Act as applied to the evidence in this case, in the following particulars:

(1) In holding and deciding that the evidence adduced at the trial of said cause below did not suffice to make the case one for the jury, and that, therefore, petitioner, as a matter of law, was not entitled to recover under the Employers' Liability Act as against respondents, J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor.

(2) In holding and deciding that the evidence adduced at the trial of said cause below, did not suffice to make the case one for the jury, and that, therefore, petitioner, as a matter of law, was not entitled to recover under the Employers' Liability Act as against respondent, the Illinois Central Railroad Company, a corporation.

(3) In holding and deciding that no substantial evidence was adduced at the trial of said cause to warrant the submission of the case to the jury on the hypothesis that respondents, J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, negligently caused, suffered, and permitted a rod, stick or other object to project out or swing out from the side of its interstate passenger train and to strike and injure and kill Haney, the deceased.

(4) In holding and deciding that no substantial evidence was adduced at the trial of said cause to warrant

the submission of the case to the jury on the hypothesis that respondent Illinois Central Railroad Company negligently failed to furnish its employee, Haney, the deceased, with a safe place to work, which negligence in whole or in part resulted in Haney's death.

(5) In holding and deciding that to submit the case to the jury, upon the theory that Haney's death was caused by something protruding out on the side of the interstate train as it backed in to Grand Central Station which resulted in Haney's death, would invite a verdict based on speculation or conjecture.

(6) In holding and deciding that to submit the case to the jury, on the theory that respondent Illinois Central Railroad Company negligently failed to furnish Haney, its employee, with a safe place to work and negligently furnished him with a dangerous place to work which resulted in Haney's death, would invite a verdict based on speculation or conjecture.

(7) In failing and refusing to consider, on the question of whether the case was for the jury as to each of the two Railroads, material testimony and evidence favorable to petitioner, having an important bearing on that issue.

(8) In inadvertently and erroneously drawing the wrong conclusions and making the wrong description of the evidence as to each of the Railroad respondents on the question of whether the case was one for the jury and in failing to consider testimony in evidence favorable to petitioner having an important bearing on the issues tried and decided by the trial court.

(9) In failing to properly consider and sustain petitioner's motion for a rehearing.

(10) In failing and refusing to amend the opinion in accordance with petitioner's motion to modify same.

(11) In holding that witness Drashman's statement, that an I. C. switchman at the time Haney's body was found, stated something sticking out from the train hit him was incompetent evidence.

(12) In holding that under the evidence, a mail hook could have hit Haney but did not.

(13) In holding that no case was made for the jury against the Illinois Central Railroad Company for failing to furnish Haney with a safe place to work without stating the issues and facts and in holding and finding that the uneven ground and insufficient light were not contributing causes of Haney's death.

SUMMARY OF THE ARGUMENT.

(1)

The evidence adduced at the trial of this cause in the State Court on the issue of respondent's Trustees liability for the injury and death of said L. E. Haney under the Employers' Liability Act as for negligence on the part of said respondent, J. M. Kurn et al., Trustees, etc., in negligently permitting something to protrude or swing out to the side of their interstate passenger train as it passed Haney, the deceased, amply sufficed to make that issue one for the jury; and Division No. 1 of the Supreme Court of Missouri erred in holding that petitioner was not entitled to have such issue submitted to the jury.

(2)

The evidence adduced at the trial of this cause in the State Court on the issue of respondent, Illinois Central Railroad Company's, liability for the injury and death of said Haney, under the Employers' Liability Act as for negligence on the part of said respondent, in negligently failing to furnish its employee Haney a safe place to work, and in furnishing him a dangerous place to work, amply sufficed to make that issue one for the jury; and Division No. 1 of the Supreme Court of Missouri erred in holding that petitioner was not entitled to have such issue submitted to the jury.

(3)

The ruling of Division No. 1 of the Supreme Court of Missouri that the evidence adduced in said cause constituted no substantial evidence to warrant the submission of the case to the jury on the hypothesis that respondent trustees negligently caused, suffered and permitted a rod, or other object, to protrude or swing out to the side of its

interstate train and that respondent Illinois Central Railroad Company failed to furnish Haney, its employee, with a safe place to work and furnished him with a dangerous place to work that resulted in Haney's death, and that to submit the case on these theories would invite a verdict based on conjecture or speculation, is not in accord with the applicable decisions of this Court holding that on the question whether a case is made for the jury, the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn therefrom; that conflicts in the evidence, the credibility of witnesses, and the weight to be given to their testimony, are for the jury; and that, if on the issue of liability, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, the question is one for the jury.

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29;

Seago v. N. Y. Cent. R. Co., 315 U. S. 781, 62 Sup. Ct. Rep. 806;

Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720;

Myers v. Pittsburgh Coal Co., 233 U. S. 184, 176, 192, 193, 58 L. Ed. 906;

New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892;

Jenkins v. Kurn, 313 U. S. 256, 61 Sup. Ct. 934;

Lumbr v. United States, 290 U. S. 551, 553, 78 L. Ed. 492;

Baltimore & Ohio R. Co. v. Groeger, 266 U. S. 521, 524, 527, 69 L. Ed. 419;

Best v. District of Columbia, 201 U. S. 411, 78 L. Ed. 888;

Choctaw O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. Ed. 96;

Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473;

Hayes v. Michigan Central R. Co., 111 U. S. 228, 28 L. Ed. 410;

Barney v. Schneider, 9 Wall. 248, 19 L. Ed. 648;
Pawling v. United States, 4 Cranch. 219, 2 L. Ed.
601.

(a) The State Court erred in holding that it could be inferred from the facts that Haney could have been struck by the mail hook knob but that this didn't happen.

Authorities cited, Supra.

(b) The State Court erred in holding that there was no substantial evidence that the uneven ground and insufficient light were contributory causes of Haney's death. This was a jury question. The jury found that by reason of this fact the place where Haney worked was unsafe and dangerous and that this was the proximate cause of his death. The State Court found that it was not the cause of his death. This was error.

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29

(4)

The State Court erred in failing to take into consideration testimony highly favorable to petitioner given by witnesses Drashman, Alvin Haney, Arnold, Bruso, Turner and Gates. Under both the Federal rule and the State rule whether the case was one for the jury was a matter to be determined on appeal by a consideration of all the evidence material to that issue.

Western Atlantic R. Co. v. Hughes, 278 U. S. 496,
73 L. Ed. 473;

Stauffer v. Metropolitan Street Ry. Co., 243 Mo.
305, 316;

Lorton v. Mo. Pac. R. Co., 306 Mo. 125, 137;

Rosenssweig v. Wells, 308 Mo. 617, 273 S. W. 1071;

Johnson v. Southern Ry. Co., 351 Mo. 1110, 175
S. W. 2nd 802.

(5)

This court, on certiorari, is not confined to a consideration of the evidence stated by the State Court in its opinion, but will review the entire record and determine for itself the sufficiency of the evidence and whether petitioner was denied a Federal right by the opinion and judgment below.

Great Northern Ry. Co. v. State of Washington, 300

U. S. 154, 81 L. Ed. 573;

United Gas Public Service Co. v. State of Tex., 303

U. S. 123, 143, 82 L. Ed. 702;

Chicago Great Western R. Co. v. Rambo, 298

U. S. 99.

ARGUMENT.

This is an action under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 52, Act of April 22, 1908, c. 149, Section 1, 35 Stat. 65), brought by Walter A. Lawender, Admr., d. b. n. of the Estate of L. E. Haney, deceased, for the benefit of the widow and children of the deceased, to recover damages for the alleged wrongful death of said deceased, charged to have been proximately caused by the negligence of the respondent, J. M. Kunt et al., trustees of the St. Louis-San Francisco Railway Company, Debtor, in negligently causing, suffering, and permitting a rod or other object to project out from the side of its interstate passenger train and the negligence of respondent, Illinois Central Railroad Company, in failing to furnish Haney, the deceased, its employee, with a safe place to work.

The pertinent provisions of the Employers' Liability Act are:

"Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representatives/ . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

The undisputed evidence in the record is that L. E. Haney was a switchtender working at his duties assigned to him at the time he was injured and killed on December 21, 1939, in the railroad yards near the Grand Central Station at Memphis, Tenn. The evidence also shows that it was Haney's duty to open and close the switch for the respondent trustees' interstate passenger train on its regular run from Birmingham, Alabama, to Memphis, Tenn.

The evidence shows that Haney's work at the time he was killed was solely for the use and benefit of the two respondent railroads herein. The Illinois Central Railroad Company was in possession of and owned Grand Central Station at Memphis, Tennessee and had a written contract with the trustee respondents of the Frisco Railroad Company for that company to use Grand Central Station jointly with the Illinois Central Railroad. In this written contract, the trustees of the Frisco Railroad Company paid the Illinois Central Railroad Company \$187 1/2 for each passenger car switched into Grand Central Station which included all of the cars in the interstate passenger train being switched and backed into Grand Central Station at the time Haney was killed (R. 197). Under the written contract between respondents the trustees of the Frisco Railroad Company agreed to and did pay the Illinois Central Railroad Company 2 1/2 of Haney, the deceased's, wages to reimburse them for that amount (R. 19). The trustees also under their written contract for the use of Grand Central Station paid the Illinois Central Railroad 2 1/2 of the wages of other switchtenders who worked at the ~~same~~ switches where Haney worked and also paid the trustees 2 1/2 of the cost of the operation of the switch lights at the place where Haney worked (R. 125-128).

The Interstate Commerce Act itself provides that where any part of an employee's duty directly affects interstate commerce he shall be deemed for the purpose of the Federal Employers' Liability Act an employee of the carrier for whom the employee is furthering the interstate movement.

Chapter 2, Title 45, U. S. Code, Section 51, in its title provides for the liability of carriers for injuries to employees and defines "employees." This section of the Act reads, in part, as follows:

“Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . .”

The definition of employee continues in the words of the Act in the second paragraph as follows:

“Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter (Apr. 22, 1908, ch. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, ch. 685, Sec. 1, 53 Stat. 1404).”

We therefore believe that it is clear beyond doubt that Haney was employed in interstate commerce at the time of his death by the respondents' railroads.

(1)

Petitioner submits that the evidence adduced at the trial of the cause in the Circuit Court of the City of St. Louis, Missouri, on the issue of respondent's liability under the Employers' Liability Act for the death of their employee, Haney, a switch tender, as for negligence on the part of both respondents as shown by the record of the cause in Division ≈ 1 of the Supreme Court of Missouri filed herewith, amply sufficed to make those issues one for the jury, and that Division ≈ 1 of the Supreme Court of Missouri erred in holding that petitioner was not entitled to have such issues submitted.

The Missouri Supreme Court's opinion found that a mail hook could have struck Haney, but that this didn't happen. They said (R. 331):

“It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches.”

The State Court's opinion overlooked the fact that witnesses Arnold and Brusio both testified that after Haney opened the switch it was his duty to remain there and close it, after the train had backed in (R. 219, 305). It also overlooked in the opinion that Haney's body was found there at the switch on the mound, described in the opinion lying face down with the character of an injury in the back of his head which would have been made, should the knob of mail hook struck him there while the train was moving, 8 or 10 miles an hour, according to Dr. Turner, who performed the autopsy on the body (R. 285-286).

The Missouri Supreme Court's opinion seeks to justify its conclusion that there wasn't sufficient evidence to submit the case to the jury as to the trustees on the theory that something protruding from the side of the train struck and killed Haney, by several different alleged reasons.

First, the opinion states that Haney was seen to go to the south side of the track after he opened the switch for the train to back in and that the trustees' conductor Creagh testified that he saw Haney go to the south side of the track. This was contradicted by the deceased's widow. Witness Creagh testified that it was so dark at the switch that he could not see how Haney was dressed 10 feet away (R. 144).

Mrs. Haney, widow of the deceased, testified that she had heard that Creagh, the conductor, was claiming that her husband, the deceased, went to the south side of the track after he had opened the switch and that she called upon witness Creagh after her husband was killed and asked him if he knew anything about how her husband

was killed; that Creagh told her his memory wasn't good and that he didn't remember anything about her husband going to the south side of the track; that he didn't know where he was standing or anything about it (R. 159). The opinion states that according to Rule 104, Haney was supposed to go to the south side of the track after he had opened the switch.

The opinion also erroneously finds that Haney's body was lying with the head toward the track and the feet extending north at right angles to the track as a reason why the mail hook didn't strike Haney. In this conclusion, the opinion overlooks the testimony of witness Bundy, another employee of one of the respondents, to the effect that Haney's head was pointing southeast (R. 213):

“Q. His head was pointing, as you say, southeast?

A. Yes, sir.

Q. And this train, Frisco train, had just backed east and turned north? A. Yes, sir.

Q. Into the station? A. Yes, sir.”

Witness Drashman, the hostile witness employee of one of the respondents, testified that Haney's body was lying parallel to the track over which the train had just backed (R. 264).

The opinion assumes that witness Drashman only testified that the I. C. switchman stated that Haney was supposed to have been struck by something sticking out from the train. It overlooks other statements made by witness Drashman more favorable to petitioner in which he testified at the trial (R. 242):

“Q. The next question: ‘Q. That is, someone told you at the scene of the accident? A. No, he didn't see the accident, I heard someone say that is what happened.’ Did you so testify? A. Yes.

Q. And that is true, isn't it? A. Yes, sir.

By the Court: Now, do you want to explain your answer?

By the Witness: Yes, sir. * * *

By Mr. Edwards: Explain any answer you want to."

But respondent's counsel refused to permit the witness to explain (R. 243).

Again Witness Drashman testified on re-examination (R. 255):

"Redirect Examination, by Mr. Edwards,

"Q. Mr. Drashman, you said on direct examination that this statement about this thing sticking out from the train hitting Haney was made by an Illinois Central switchman, don't you remember telling me that?

A. I suppose it was a switchman, I don't know who it was. * * *

Q. You said a moment ago that the man who made the statement that something sticking out from the train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.

Q. That is true, isn't it? A. I think so; no one else was around there but I. C. men at that time."

(2)

The evidence was uncontradicted that it was exceedingly dark at the switch where Haney was working. One witness said you couldn't see how a man was dressed ten feet away at the switch (R. 144). Under the evidence, it was clear that Haney could not see or be seen at the switch where he worked and where his body was found. Under plaintiff's instruction 4, which submitted the case as against respondent Illinois Central Railroad Company, the jury were required to find that the ground was high and uneven, the light was inadequate and insufficient, and the place was unsafe and dangerous, and that Haney was injured by reason of the place being unsafe and dan-

gerous before they could find for plaintiff. The instruction did not require the jury to find that a mail hook struck Haney. No objection has been made to the instruction on appeal. The Supreme Court's opinion near the end, in four lines, takes away petitioner's right to trial by jury and decides the question of fact against the petitioner in these words (R. 331) (*Layender v. Kurn*, 189 S. W. 253, 1. c. 259):

"And we also rule that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney."

By this cryptic clause the State Supreme Court's opinion decided a question of fact contrary to the jury's finding.

The jury had found under plaintiff's instruction No. 4 (R. 166-168) not only that the place was unsafe and dangerous, but they found that the unsafe and dangerous place was the proximate cause of the injury and death of Haney. The Supreme Court of Missouri usurped the power of the jury in deciding the question of the proximate cause of Haney's death and reversed the jury's verdict and finding on that question. The State Supreme Court therefore deprived your petitioner and the dependents of Haney of their constitutional right of trial by jury.

(3)

The ruling of the Supreme Court of Missouri, Division No. 1, that in this case no substantial evidence was adduced to warrant the submission of the case to the jury on the hypothesis that something protruding from the side of the passenger train struck Haney and that respondent Illinois Central Railroad Company negligently failed to furnish him with a safe place to work, which resulted in his death, but that to submit the case on those theories

would invite a verdict based on conjecture and speculation is plainly not in accord with the applicable decisions of this court.

It is the well-settled rule of this Court that, on the question whether a case is made entitling the plaintiff to the judgment of a jury, the evidence is to be viewed in the light most favorable to the plaintiff, and the plaintiff is to be accorded the benefit of every inference favorable to him that may fairly and reasonably be deduced therefrom; that it is the province of the jury to resolve any conflicts in the evidence and to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on the issue of liability, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, the question is not one of law for the Court but one of fact for the jury.

Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720;

Meyers v. Pittsburgh Coal Co., 233 U. S. 184, 1. c. 192, 193, 58 L. Ed. 906;

New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892;

Jenkins v. Kurn, 313 U. S. 256, 61 Sup. Ct. 934;

Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 527, 69 L. Ed. 419;

Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473;

Hayes v. Michigan Central R. Co., 111 U. S. 228, 28 L. Ed. 410, 1. c. 415.

The principles here applicable have been stated and applied by this Court in a long line of decisions from the time of Chief Justice Marshall (*Pawling v. United States*, 4 Cranch. 219, 2 L. Ed. 601). But in the instant case the state court failed to apply such principles to the facts of this record. We mean no disrespect to the state court when we say that it rendered lip service to the rule that

where uncertainty arises from a conflict in the testimony, or if fair-minded men may honestly draw different conclusions from the evidence, the case is one for the jury (R. 331), but inadvertently failed to realize that a proper application thereof to the evidence in this record would compel a holding that the case was one for the jury.

The Missouri Supreme Court first found that it could be inferred that the mail hook struck Haney as alleged in plaintiff's petition and found by the jury. It then searches the record for bits of evidence, which are contradicted by plaintiff's evidence, and finds this contradictory evidence to be true as a matter of fact. For example, the opinion indicates that it finds that Haney after throwing the switch went to the south side of the track. The opinion states that Creagh, respondent's witness, so testified and that Rule \approx 104 provides that Haney should go to the south side of the track. The opinion fails to state or consider the testimony of Mrs. Haney to the effect that Creagh told her that he didn't know anything about where Haney went; that he didn't know where he was standing, and that his memory was bad. The witness testified that he could not see how Haney was dressed ten feet away.

The opinion also fails to state that the evidence showed that it was Haney's duty to be at the switch where his body was found.

The application of Rule \approx 104 that Haney should have gone to the south side of the track is disputed by witnesses Arnold and Brusio, employees of the respondents, who stated that it was Haney's duty after opening the switch to remain at the switch and close it as soon as the train had cleared. The State Court refused to correct its opinion on petitioner's motion to modify. The opinion also asserts that Haney's body was lying at right angles to the track. It ignores other testimony that the body was lying with the head pointing in the direction which the train had backed. The opinion also rules out the important tes-

timony of one of respondent's employees, Drashman, in which he stated that one of respondent's, Illinois Central's, switchmen at the scene of the accident, a few minutes after the body had been found, stated that something sticking out from that train hit Haney. The opinion fails to state the issue or to properly decide the case on petitioner's right to recover against the Illinois Central Railroad Company for failing to furnish Haney a safe place to work. It simply states and rules that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney. By this ruling the State Supreme Court decided a question of proximate cause against petitioner, when under the law this is a question of fact for the jury and should be left to the jury's finding.

In a suit under the Federal Employers' Liability Act to recover for the death of an employee there was evidence from which the jury could reasonably infer that failure to ring the bell before starting the locomotive was negligence of the defendant, and that that negligence was the proximate cause of the death; and a judgment for the defendant notwithstanding a verdict for the plaintiff deprived the latter of the right to trial by jury. P. 33.

An appellate court is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because the court regards another result as more reasonable. P. 35.

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, this Court said, 1. c. 35:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review

is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact-finding body. * * *

"Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In the case of *Seago v. New York Central Railroad Company*, 315 U. S. 781, 62 Sup. Ct. Rep. 806, this court by memorandum opinion reversed the Missouri Supreme Court in an opinion written at 155 S. W. 2d 126. In a Federal Employers' Liability case, the Missouri Supreme Court, as it has in the case at bar, held that there was not sufficient evidence to take the case to the jury on the theory that no hand-lantern back up signal had been given before the train was started, and gave a similar reason as in the case at bar, in that to have held that the case was properly submitted to the jury would permit a verdict to have stood on conjecture and speculation.

In *New York Central R. Co. v. Marcone*, 281 U. S. 345, 74 L. Ed. 892, the deceased employee, employed in the defendant's roundhouse, was run over and killed by an engine while it was being backed out of the roundhouse. There was no eyewitness to the accident. Despite uncontradicted testimony that the whistle was sounded a few minutes before the engine began to move, as a warning that it was to be backed out of the roundhouse, this Court held that from the evidence as a whole and the inferences that might be drawn therefrom reasonable men could with propriety conclude that the defendant was negligent in failing to take reasonable precautions to avert such a casualty.

In the recent case of *Jenkins v. Kurn*, 313 U. S. 256, 61 Sup. Ct. Rep. 934, the plaintiff was a fireman on a moving train. As the train emerged from a curve he observed a

train standing not more than six hundred feet ahead on the same track and shouted to the engineer to push the brake valve over in emergency. The engineer turned and looked at the plaintiff but did nothing to arrest the movement of the train until the engine was but two or three car lengths from the standing train, at which moment plaintiff leaped from the engine and was injured. The engineer was killed. Division No. 1 of the Supreme Court of Missouri held that no case was made for the jury and reversed the judgment below on the ground that there was "Not even a scintilla of evidence that the engineer understood what plaintiff said" (*Jenkins v. Kurn*, 144 S. W. [2] 76, l. c. 79).

It happens that the opinions in both the *Jenkins* and *Seago* cases were written by the same Commissioner who wrote the opinion in the instant case. This Court reversed the opinion and judgments in both the *Jenkins* and the *Seago* cases on the ground that the Missouri Supreme Court erred in holding that the cases should not have been submitted to the Jury.

In the *Jenkins* case the state court failed to reckon with the inferences that arose from the plaintiff's testimony that he "hollered" his warning loudly, that only a narrow space separated him from the engineer, that the engineer's hearing was "all right," that the plaintiff and the engineer could and did carry on "normal conversations" while the train was operating, and that there was comparatively little noise in the cab from the train. This court granted certiorari, and upon a review of the case held that the evidence was ample to warrant the submission of the issue of the engineer's negligence to the jury and reversed the judgment of Division No. 1 of the Supreme Court of Missouri therein (*Jenkins v. Kurn*, 313 U. S. 256). By the same token the judgment of the state court in the instant case should be reversed.

(4)

The opinion of the Supreme Court of Missouri, in holding and deciding that there was not sufficient evidence to submit the question of the Illinois Central Railroad Company's liability to petitioner for failing to furnish Haney, its employee, a reasonably safe place to work, is in direct conflict with the decisions and holdings of this Court. In the case of Choctaw, Oklahoma R. R. Company v. McDade, 191 U. S. 64, this Court held that it is the duty of a Railroad Company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ. It is obliged to use the same degree of care to provide properly constructed road bed structures and track to be used in the operation of the railroad. The respondent Illinois Central Railroad Company, therefore, under the holding of this court, was charged with the duty to use due care to provide a reasonably safe place for Haney to work. It did not provide such a place and Haney was killed by reason thereof. The jury so found. The Missouri Supreme Court erred in holding to the contrary and its opinion is in conflict with this Court's decisions on that question.

Where workmen are engaged in a hazardous occupation, such as underground mining, it is the duty of the master to exercise reasonable care for their safety, and not to expose them to injury by use of dangerous appliances or unsafe places to work, when such appliances and places can, by the exercise of due care, be made reasonably safe.

Myers v. Pittsburgh Coal Co., 233 U. S. 184, 1 c. 191:

"The trial court submitted the case to the jury to determine whether the defendant had failed to discharge its duty of using reasonable care to provide a proper and safe place for Myers to work, that is, in failing to provide adequate lights at a dangerous place and permitting the motor car to be operated without the headlight, and also in permitting an ex-

posed live trolley wire to cross the main track at insufficient elevation. An inspection of the record satisfies us that there was testimony enough in the case to carry these questions to the jury under the instructions which were given. The duty of the master to use reasonable diligence to provide a safe place for the employes to work, to carry on the occupation in which they are employed is too well settled to require much consideration now. This duty is a continuing one and discharged only when the master provides and maintains a place of that character. *Baltimore & Potomac R. R. Co. v. Mackey*, 157 U. S. 72, 87; *Union Pacific Ry. Co. v. O'Brien*, 161 U. S. 451; *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64; *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 255. Under the case made, the jury might well have found that the overhead wire was hung too low for the safety of the men; that there was want of adequate light at this place, and that it was negligence to run the motor car into such a place without the light which it was its duty to provide. Where workmen are engaged in such mines in occupations more or less hazardous, it is the duty of the master to exercise reasonable care for their safety and not to expose them to injury by use of dangerous appliances or unsafe places to work, when the exercise of due skill and care will make the appliances and places reasonably safe. *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, *supra*, 66; *Kreigh v. Westinghouse & Co.*, *supra*, 256."

Under both the federal rule and the state rule whether there was evidence to warrant the submission of the issue of the engineer's negligence was a matter to be determined on appeal by a consideration of all the evidence material to that issue. *Western Atlantic R. Co. v. Hughes*, 278 U. S. 496, 73 L. Ed. 473; *Stauffer v. Metropolitan Street Ry. Co.*, 243 Mo. 305, 316; *Lorton v. Mo. Pac. R. Co.*, 306 Mo. 125, 137. The state court failed to observe the rule.

(5)

This court, on certiorari, is not confined to a consideration of the evidence stated by the state court in its opinion, but will review the entire record and determine for itself whether the evidence sufficed to take to the jury the issue of negligence; whether petitioner was denied a federal right by the opinion and judgment of the state court. *Great Northern Ry. Co. v. State of Washington*, 300 U. S. 154, 81 L. Ed. 573; *United Gas Public Service Co. v. State of Texas*, 303 U. S. 125, 143, 82 L. Ed. 702; *Chicago Great Western R. Co. v. Rambo*, 298 U. S. 99.

CONCLUSION.

From the foregoing, we submit that it appears clearly from the facts in this case that the deceased, Haney, was struck and killed by something protruding or swinging out from the side of respondent trustee's interstate train and that the Supreme Court of Missouri committed error in finding that a mail hook could have struck the deceased but didn't, and erred in holding that there was not sufficient evidence to submit the question of respondent trustee's liability to petitioner to the jury and that there was sufficient evidence to submit the question as to whether or not respondent Illinois Central Railroad Company furnished Haney with a safe place to work and that the Supreme Court of Missouri erred in holding that there was not sufficient evidence to submit to the jury the question of the liability of the respondent Illinois Central Railroad Company for failure to furnish the deceased with a safe place to work and that the Supreme Court of Missouri's finding and holding that the uneven ground and insufficient light were not causes contributing to Haney's death was erroneous.

It consequently follows that the Supreme Court of Missouri erred in reversing the judgment secured by this

petitioner against the respondents on the theory that to affirm the judgment would invite a verdict based on speculation or conjecture. We, therefore, respectfully submit that this Honorable Court should reverse the judgment and decision of the Supreme Court of Missouri, and order the judgment in favor of petitioner reinstated.

Respectfully submitted,

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APPENDIX.

We set out below, for the convenience of the Court, in reference, Sections of the Judicial Code and Federal Employers' Liability Act as the same appear in the United States Code.

Title 28, Judicial Code, Section 344:

“344. (Judicial Code, Section 237.) Appellate Jurisdiction of Decrees of State Courts; Certiorari.

“(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed ~~by~~ the Supreme Court upon appeal. The appeal shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the appeal.

“(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties,

or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on appeal in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on appeal might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

Sections 51 and 52:

"51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of

interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. (Apr. 22, 1908, ch. 149 1, 35 Stat. 65; Aug. 11, 1939, ch. 685-4, 53 Stat. 1404.)

"52. Carriers in Territories or other possessions of the United States.

"Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband, and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment (Apr. 22, 1908, ch. 149 2, 35 Stat. 65)."

LIST OF CASES DISCUSSED IN THIS BRIEF.

- Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29;
Seago v. N. Y. Cent. R. Co., 315 U. S. 781, 62 Sup. Ct. Rep.
806;
Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720;
Myers v. Pittsburgh Coal Co., 233 U. S. 184, 1. c. 192, 193,
58 L. Ed. 906;
New York Central R. Co. v. Marcone, 281 U. S. 345, 74
L. Ed. 892;
Jenkins v. Kurn, 313 U. S. 256, 61 Sup. Ct. 934.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator
de bonis non of the Estate of L. E.
HANEY, Deceased,

Petitioner,

vs.

J. M. KURN et al., Trustees of ST.
LOUIS-SAN FRANCISCO RAILWAY
COMPANY, Debtor, and ILLINOIS
CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.

On Writ of Certiorari to the Supreme Court
of the State of Missouri.

REPLY BRIEF OF PETITIONER.

✓ **N. MURRY EDWARDS,**
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SUPREME COURT OF THE UNITED STATES.

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On Writ of Certiorari to the Supreme Court
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REPLY BRIEF OF PETITIONER.

SUMMARY OF ARGUMENT.

1.

Haney, the deceased, was an employee of both respondents at the time he was killed. His duties under the control and direction of respondents, of opening and closing the switch for the interstate train of the trustees, directly affected and was in furtherance of interstate commerce.

Chapter 2, Title 45, U. S. Code, Section 51;

Linstead v. Chesapeake & Ohio Ry. Co., 276 U. S.
28, 1. c. 34, 48 S. C. 241;

Denton v. Yazoo & M. V. R. Co., 284 U. S. 305,
1. c. 308.

2.

The evidence most favorable to petitioner made a submissible case against both respondents.

Bailey v. Central Vermont Ry., 319 U. S. 350, 87 L. Ed. 1444, 63 Sup. Ct. 1062;

St. Louis, Iron Mountain & Southern Ry. Co. v. McWhirter (1913), 229 U. S. 265, 57 L. Ed. 1179, 33 Sup. Ct. 858;

12 A. L. R. 699;

Southern Railway Co. v. Gray (1916), 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558.

Goslin v. Kurn, 351 Mo. 395, 173 S. W. (2d) 79;
(See cases cited in Point III in Petitioner's Brief.)

3.

The testimony of Respondent Trustees' employee Drashman that he heard one of respondent I. C.'s switchmen, while standing near Haney's body immediately after it was discovered, state that something sticking out from the Frisco train struck Haney, was admissible as part of the res gestae.

Chesapeake & Ohio R. Co. v. Mears (C. C. A. 4 1933), 64 F. (2nd) 291;

Armabast v. Cincinnati Traction Co. (C. C. A. 6 1928), 25 Fed. (2nd) 240;

Standard Oil Co. v. Johnson (C. C. A. 1 1924), 299 Fed. 93;

Pierce v. Van Dusen, 78 Fed. 693;

Attleboro Mfg. Co. v. Frankfort Marine etc., 240 Fed. 573.

(a)

The admission of the statement made by the I. C. switchman at the time Haney's body was found was a matter of discretion of the trial court.

32 Corpus Juris Secundum 22;

Fort Street Union Depot v. Hillen (C. C. A. 6 1941),
119 F. (2nd) 307;

Barry v. Baker (C. C. A. 1 1936), 82 Fed. (2nd) 79.

• 4.

The admissibility of evidence in a suit under the Federal Employers' Liability Act is governed by Federal rather than local rules of law.

35 American Jurisprudence 874 (Sup.);

Bailey v. Central Vermont R. Co., 319 U. S. 350;

Tennant v. Peoria & P. V. Ry. Co., 321 U. S. 29.

ARGUMENT.

1.

At the time of his death, Haney was performing duties pursuant to the provisions of a contract entered into between the two respondents (R. pp. 155-167) as supplemented by letter agreement (Trustee's Exhibit "F," R. p. 108). Respondent trustee paid to respondent I. C. Railroad 2/12 of Haney's wages to reimburse them for that amount and also paid respondent I. C. Railroad for 2/12 of the cost of the electric lights at the switches which Haney was taking care of at the time he was killed. Plaintiff's evidence showed that Haney was paid by respondent I. C. Railroad (Plaintiff's Exhibit 6, R. p. 90) and he and his wife and family traveled on the I. C. Railroad on one of its employee passes (R. p. 88). Respondent I. C. Railroad Company owned the Grand Central Station and passenger terminal and had a written contract with respondent trustees for the joint use of the passenger terminal and station whereby the trustees paid the Illinois Central Railroad \$1.87 $\frac{1}{2}$ per passenger car switched into Grand Central Station, which included all the cars in the train that Haney was switching at the time he was killed. Haney was not performing any services for any other company or railroad other than the respondent's at the time he was injured and killed.

Witness Arnold testified that he was an employee of the respondent I. C. Railroad Co., and worked as a switchtender on the next crossing north of where Haney worked; that he opened the switch for the trustees' interstate passenger train the night Haney was killed and that his duties were the same as Haney's; that he had worked for the respondent I. C. Railroad as a switchtender for four years (R. p. 179), performing similar duties to those of Haney.

Under Chapter 2, Title 45, U. S. Code, Section 54, and

the cases of *Linstead v. Chesapeake and Ohio Railroad Co.*, 276 U. S. 28, and *Denton v. Yazoo & M. V. R. Co.*, 284 U. S. 305, i. e. 308, Haney was an employee of both respondents at the time he was injured and killed.

2.

The evidence most favorable to petitioner showed that on December 21, 1939, at about 7:30 P. M. within the railroad yards owned and operated by respondent I. C. Railroad in Memphis, Tennessee, Haney, the deceased, a switch tender in the performance of his duties, opened a switch so as to permit respondent trustee's interstate passenger train to back north into respondent I. C.'s Grand Central Station from an east and west track.

It was Haney's duty as switch tender, as well as a custodian in the yards, to stand near the open switch until the backing train cleared the switch, then close it and return to his shanty (R. pp. 181-182, 265-266).

Red signal lights over the switch and over Haney's shanty prevented other train crews from using the switch and adjacent tracks. Immediately after the train cleared the switch, other switching crews waiting to use a crossing which Haney had blocked noticed that the light at the switch which Haney had opened remained red and prevented them from using the crossing. An investigation was made and Haney's body was found, lying face down, about 5 or 5½ feet north of the north rail, near the switch on a mound of dirt or cinders adjacent to the track on which the train had just backed over. Haney's body was lying face down with the head pointing southeast, or parallel to the track (R. pp. 175-76, 225-26), with a wound in the back of his head, extending upward across the back thereof. While the body was lying in this position and before it had been turned over, a man dressed in switchman's clothing identified as an I. C. switchman stated to

one of the trustees' employees that something sticking out from that train hit Haney (R. pp. 227, 205, 217), that's what happened. The only injury to Haney was the wound in the back of the head and bruises on his face caused by striking the ground. Haney's white cap had a dark mark on the outside in the back about an inch wide and $1\frac{1}{2}$ inches long which ran at an angle up across the outside thereof which corresponded to the wound on Haney's head (R. pp. 167-168).

Trustees' interstate passenger train had backed east and turned north at the switch opened by Haney. The passenger train consisted of 12 cars with a Frisco mail car coupled next to the tender of the engine. This mail car had a mail hook on both sides fastened in a pivot at the top swinging down loose on the outside of the car with a round knob or ring on the end, the bottom of which was 73 inches from the top of the rail. There were mounds and piles of dirt and cinders north of the tracks at the switch where Haney's body was found, which were from 18 inches to 2 feet above the top of the rail (R. pp. 79, 80, 229, 261-266). Haney was five feet seven and one-half inches or sixty-seven and one-half inches tall. The mail hooks hanging loose on the side of the car would swing out a distance of from 12 inches to 3 feet to the side of the car while the train moved around a curve or at excessive speed or over a wavy track (R. pp. 83-84, 62, 231). The passenger train as it backed past Haney went around a bad curve (R. p. 128). The side of the passenger train extended about $2\frac{1}{2}$ feet out to the side of the track (R. p. 169).

There were no rods, pipes, weapons of any kind which could have caused the wound to the back of Haney's head, found near the body. Haney's pistol which was in his front pocket was found under his body (R. p. 175). The doctor who examined Haney's body and assisted in performing an autopsy testified that Haney's death was

caused by a fracture of the skull from a wound in the back of the head caused by a small round fast moving object striking the deceased in the back of the head which wound in his opinion could have been caused by a rod attached to the side of a train backing 8 or 10 miles an hour (R. pp. 247-248). The engineer testified that he backed the train in at about 8 or 10 miles an hour (R. p. 128).

The evidence further showed that at the switch and place where Haney worked, the ground was high and uneven and there was no artificial light and it was so dark that Haney could not see or be seen for any distance. One witness testified that he could not see how a man was dressed at the switch, ten feet away (R. p. 124.) Alvin Haney testified that it was so dark that he could not see a three-inch pipe 25 feet away (R. p. 277). The engineer testified that it was so dark that he could not see a rod three inches in diameter 50 feet away (R. p. 130) and that he did not see Haney's body lying at the switch as he passed and that it was possible that someone could have been lying there and he would not have seen them (R. p. 128), likely would not have. A light was erected over the switch afterwards (R. p. 23, 169). For a more complete statement of the facts see statement of the case, brief of petitioner, pages 4-11.

The case was submitted to the jury as against the trustees for negligently causing and permitting a rod or some other object to swing or extend out from the side of their train and strike Haney. The case was submitted to the jury as to the respondent I. C. Railroad for negligently failing to furnish Haney with a safe place to work. This instruction required the jury to find that the ground was high and uneven; that the light was insufficient and inadequate and that the place was unsafe and dangerous and that this constituted negligence and that Haney was injured and killed by reason of the place being unsafe and

dangerous. The jury so found. This instruction did not require the jury to find that Haney was killed by something sticking out from the side of the passing train. The respondents instructed the jury that if Haney went to the south side of the track and was last seen there before the train backed in they should find for the respondents.

In the case of *Bailey v. Central Vermont Ry.* (1943), 319 U. S. 350, 87 L. Ed. 1444, 63 Sup. Ct. 1062, this court reversed a state Supreme Court decision which had reversed a trial court and had held that there was not sufficient evidence of negligence to submit the cause to the jury. This court, after detailing the evidence most favorable to the petitioner, stated:

"The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances **for the jury to weigh and appraise** in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach a different conclusion, emphasize the appropriateness of leaving the question to the jury. * * * The jury is the tribunal under our legal system to decide that type of issue, * * * as well as issues involving controverted evidence (citing cases). To withdraw such a question from the jury is to usurp its functions.

"The right of trial by jury is a basic and fundamental feature of our system of Federal jurisprudence (citing case). It is part and parcel of the remedy afforded railroad workers under the Emp. Liability Act. * * *

In the case of St. Louis, Iron Mountain & Southern Ry. Co. v. McWhirter (1913), 229 U. S. 265, 57 S. Ed. 1179, 33 Sup. Ct. 858, this court reversed and remanded a case to a State Court because of an erroneous instruction which authorized recovery upon showing of the employer's violation of the sixteen-hour law without requiring a showing of causal connection between the violation and the injury. This court after detailing the evidence made the following observation in respect to its right to review the decision of the state court:

"While it is true, as we have said, that coming from a state court the power to review is controlled by Rev. Stat. 709, yet where in a controversy of a purely Federal Character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal Law."

In 12 A. L. R. 699 it is said:

"As this is a Federal statute, the plaintiff, if he relies upon the common law, must prove his case in accordance with the principles of that law, as interpreted and applied in the Federal Court."

In Southern Railway Co. v. Gray (1916), 241 U. S. 333, 60 L. Ed. 1030, 36 Supreme Ct. 558, in a suit for the death of a brakeman who was killed on a railroad track after he fell asleep thereon, the court reversed a judgment against the railroad, on the ground that there was no evidence of its negligence, the court holding that a motion to dismiss should have been granted. The court in part said:

"As the action is under the Fed. E. L. Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in the Federal courts."

Respondent I. C. Railroad is charged with negligently failing to furnish the deceased with a safe place to work. Only four or five pages of respondent's 52-page brief are devoted to a discussion of that issue. Respondent discusses everything except the charge against it. In a rambling discussion of issues against the other respondent, it also claims that there was no duty upon it to furnish the deceased with a safe place to work because the accident happened in a public street of the City of Memphis. All the evidence shows that the place of the injury was entirely within the domination and control of the respondent I. C. R. R. within its terminal yards and on the tracks leading from its own grand central station to the Frisco line. Respondent's evidence only indicates that the switch which Haney had opened and the railroad tracks at that place were elevated above a street, which was a dead-end to all crossing public streets.

The case of *Goslin v. Kurn* (351 Mo. 395), 173 S. W. 2d 79, holds that where a switchman is injured by catching his foot in a rut near the rails **across a public street**, the carrier is liable for failure to furnish a reasonably safe place for the switchman to work.

3.

Witness Drashman, an employee of the respondent trustees, testified that he went to the scene of the accident while Haney's body was still lying face down and before it had been turned over or removed (Abs. pp. 204-5). Haney's body was turned over within five minutes after it was found by Brusco and Bundy (R. pp. 27-28). Drashman testified that an I. C. switchman there where Haney's body was lying face down stated that something sticking out from the passenger train struck Haney. When questioned about this, witness Drashman, who was employed by respondent trustees and was shown to be hostile, made

several different statements about the matter. He testified:

"I heard someone say that is what happened.

Q: Did you so testify? A. Yes.

Q. And that is true, isn't it? A. Yes.

By the Court: Now do you want to explain your answer?

By the Witness: Yes, sir."

Respondent's attorneys objected to their employee explaining and he did not make an explanation (R. p. 205). Witness Drashman testified, in answer to questions of respondent's counsel, that he did not know whether the I. C. switchman who made the statement was present or not when the accident happened (R. p. 216).

"Q. And you don't know whether the person or persons that made such statement or statements were present when the accident happened or not do you?
A. No, sir, I do not.

Q. And you don't know whether they claim to have been present or not, do you? A. No, sir."

On redirect examination about this matter witness Drashman testified (R. p. 217):

"Q. You stated a moment ago that the man who made the statement that something sticking out from the train hit Haney was an I. C. switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.

Q. That is true, isn't it? A. I think so, no one else was around there but I. C. men at that time."

Respondents claim that the I. C. switchman whose statement was heard by Drashman did not see the accident. Nevertheless, the undisputed facts show that the switchman made his statement immediately after the accident while standing over Haney's dying body.

The respondents offered instruction asking that the court withdraw from the jury's consideration statement made to witness Drashman to the effect that something sticking out from the train hit Haney. This instruction was refused (R. p. 147).

In the case of Chesapeake & Ohio R. Co. v. Mears (C. C. A. 4 1933), 64 F. (2nd) 291, in an action under the Federal Emp. L. Act for the death of an employee who was knocked off a car by another car on a siding, the court reversed a judgment for plaintiff because of a faulty instruction respecting the measure of damages, but held, among other things, that a statement which deceased made before his death was admissible as part of the *res gestae*. His statement was: "That car knocked me off." The court reviewed and approved several cases concerning the *res gestae* rule.

In *Armabast v. Cincinnati Traction Co.* (C. C. A. 6 1928), 25 Fed. (2nd) 240, the court held that a statement of an unknown bystander to a street car accident to the effect that "Lady you are hurt, you were thrown off that car," should have been admitted as part of the *res gestae*. The court cited in support of its ruling federal cases from the first, sixth and ninth circuits.

In *Standard Oil Co. v. Johnson* (C. C. A. 1 1924), 299 Fed. 93, the court approved the admission in evidence of the statement of an unknown bystander to an accident in which a pedestrian was killed by an automobile. The bystander said:

"Why didn't you blow your horn?"

The court, in part, said:

"Defendant's learned counsel has cited some cases which tend to sustain his contention. Nevertheless we think that, in the light of the decisions which should

guide and perhaps must bind us, the evidence was advisable."

The court then proceeded to cite and quote from Federal cases, and then cited cases from state courts. It relied upon the cases of *Pierce v. Van Dusen*, 78 Fed. 693, decided by the sixth circuit, and *Attleboro Mfg. Co. v. Frankfort Marine etc.*, 240 Fed. 573, decided by the first circuit.

(3a)

It must be remembered that the trial court observed the demeanor of Drashman, saw that he was hostile to petitioner, learned that he was ~~deposition had been previously taken~~ brought to the trial from Memphis by respondent (R. p. 186) learned that he then worked and had worked for Frisco R. R. for forty years, heard him repudiate many sworn statements previously made in a deposition and observed how he acquiesced in answering leading questions of respondent's counsel. The trial court further learned that Drashman examined respondent trustees' train for protruding objects after he heard the statements made by the I. C. switchman. This discretion of the trial court in admitting the res gestae evidence should not be disturbed. The Federal authorities so hold.

In 32 C. J. S. 22 it is stated:

"The facts and circumstances presented in different cases vary so widely that the courts have come to the point of adjudging this question as it is presented by the particular case under consideration, and the admissibility vel non of evidence as part of the res gestae is a matter resting very largely in the discretion of the trial court. The tendency of the courts, however, has been to extend rather than narrow the matters which may be admitted under the res gestae doctrine."

In the case of Fort Street Union Depot v. Hillen (C. C. A. 6 1941), 119 F. (2nd) 307, the court sustained a judgment for damages arising from death of brakeman struck by a grab iron on another car. Before he died the employee stated that he "got knocked off" the car he was riding by the grab iron on another car. The court in part said:

"The time elapsing after the injury and all the circumstances bearing on spontaneity and lack of deliberation are factors to be considered. Here the actual time in minutes after the accident was not specifically shown but the circumstances and the movements of the witnesses clearly indicate, we think, that the statement was made about five minutes after the injury. * * * **Much must be left to the sound discretion of the trial judge in rulings on admissibility of evidence of the instant character.**"

In the case of Barry v. Baker (C. C. A. 1 1936), 82 Fed. (2nd) 79, involving an automobile collision, the court sustained a judgment for plaintiff against the attack, among others, that statements made by defendant's driver were inadmissible. The driver said: "When I seen you coming I thought you were coming on the other side of the road." In sustaining the trial judge who admitted the statement, the court said:

"As to whether such declarations should be admitted in a given case, **the general and better rule seems to be that it is largely a question to be determined by the trial court upon consideration of all the circumstances disclosed.**"

4.

In the Bailey and Tennant cases and many others this Court has held that it will finally determine whether the evidence in a case of this kind will support a verdict. This Court cannot carry out such responsibility if a state court

may rule out of a case any or all competent evidence offered. Such attempts of exclusion of evidence would certainly effect the substantive rights of litigants and fritter away the beneficial purposes of the Congressional Act.

In 35 Am. Jur. 874 it is stated:

“An action seeking recovery by virtue of the provisions of the Emp. L. Act must be brought in the manner that has been prescribed by the Act. Where the statute appears to govern any question as to substantive law, practice or procedure, the state law is superceded, and the Federal Act alone controls.”

Cumulative Supplement: “add following note 18. The rights created by the Federal Emp. L. Act are Federal rights protected by Federal rather than local rules of law.” Citing case of Bailey v. Central Vermont R. Co., supra.

We, therefore, respectfully submit that this Honorable Court should reverse the judgment and decision of the Supreme Court of Missouri, and order the judgment in favor of petitioner reinstated.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

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LOUIS-SAN FRANCISCO RAILWAY
COMPANY, Debtor, and ILLINOIS
CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.

SEPARATE BRIEF

Of Respondents, J. M. Kurn et al., Trustees of
St. Louis-San Francisco Railway Company,
Debtor, in Opposition to Petition for
Writ of Certiorari.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator
de bonis non of the Estate of L. E.
Haney, Deceased,

Petitioner,

vs.

J. M. KURN et al., Trustees of ST.
LOUIS-SAN FRANCISCO RAILWAY
COMPANY, Debtor, and ILLINOIS
CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.

SEPARATE BRIEF

Of Respondents, J. M. Kurn et al., Trustees of
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Debtor, in Opposition to Petition for
Writ of Certiorari.

STATEMENT.

For convenience and brevity these respondents, J. M. Kurn et al., Trustees of St. Louis-San Francisco Railway Company, Debtor, will be referred to as "Trustee defendants," their co-respondent, Illinois Central Railroad Company as "Illinois Central," and petitioner as "plaintiff."

The decision of the Supreme Court of Missouri, 189 S. W. (2d) 253 (R. 320-331), in our opinion states the facts more favorably to plaintiff than the record warrants. This is particularly true as to the statement

"It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches," 189 S. W. (2d) 253, l. c. 255 (R. 325). However, the holding of said Court that it would be mere speculation and conjecture to say that Haney was struck by the mail hook is so obviously sound and in harmony with the applicable decisions of this Court that Trustee defendants, for the purposes of this brief, will not burden the Court with citations and quotations from the record which we contend show the decision more favorable to plaintiff than warranted in the respect above pointed out.

Comment on erroneous statements in plaintiff's petition for certiorari and brief in support thereof, and further comment on the facts will be reserved for the argument.

GROUND S URGED IN ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. The writ should be denied for the reason that neither plaintiff's petition for writ of certiorari nor the supporting brief are direct and concise and contain no direct, accurate or concise statement of fact, in violation of Section 2, Rule 38 of this Court, and the decisions therein cited (306 U. S. 716).

II. Because the holding of the Supreme Court of Missouri that it would be mere speculation and conjecture to say that Haney was struck by the mail hook is in harmony with the applicable decisions of this Court.

Brady v. Southern Ry. Co., 320 U. S. 476;

Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472;

Kansas City Southern Ry. v. Jones, 276 U. S. 303;

New Y. C. R. Co. v. Ambrose, 280 U. S. 486, 490;

Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351;

Atchison etc. Ry. v. Saxon, 284 U. S. 458;

Penn. R. R. Co. v. Chamberlain, 288 U. S. 333.

ARGUMENT.

I.

The petition should be denied because petitioner failed to comply with Rule 38 of this Court.

Section 2 of Rule 38 of this Court provides that a petition for certiorari shall contain a summary and short statement of the matter involved, and that the supporting brief must be direct and concise. Neither the statement of fact contained in the petition nor the statements contained in the supporting brief comply with this Rule in that such statements are not direct, concise or accurate.

As to the contention that said petition and supporting brief do not contain the direct and concise statements required by said Rule, this Court will reach its conclusion from an inspection thereof. As to the contention that said statements are inaccurate, we desire to comment briefly.

In a number of places throughout the petition and supporting brief plaintiff's counsel, in referring to the mail hook, used expressions such as "hung down loose," "not fastened at the bottom," and "swinging loose." These expressions are not in and of themselves inaccurate, but they may be somewhat misleading unless the Court bears in mind a matter which plaintiff's counsel failed to mention, namely, that there was no charge and not one iota of evidence that the mail hook in question was defective, or that it was in any way different from the regular standard mail hook to be found on mail cars throughout the country.

At the top of page 18 of the petition, following the assertion that the evidence tended to show that deceased was struck by "a mail hook swinging loose," plaintiff's counsel said: "There was no evidence of any kind that anything else could have killed Haney." This statement is more than misleading. It is definitely inaccurate.

There was substantial evidence that Haney was struck in the back of the head with a pipe or other blunt instrument in an attempt to rob him. His pistol was out of its holster and lying under his body (R. 90, 111). The police homicide squad made an investigation. They were present the next morning when pictures were taken at the location where Haney's body was found, and we ask the Court at this point to examine those pictures, which are set out opposite page 120 of the record, and to refer particularly to the picture marked "Defendant's Exhibit B," and the testimony explanatory thereof (R. 111, 112).

Plaintiff's witness, Dr. Turner, who helped perform the autopsy, testified as follows:

"Q. And it is very possible then in your opinion and judgment that this man could have suffered a blow by some, maybe, gas pipe or club or some similar round object? A. Yes.

Q. Also in the hands of some individual? A. Yes, it could be" (R. 288).

The Supreme Court of Missouri, in referring to the record in this connection, said:

"It appears in the record that the area immediately about the switch was not very well lighted, was dark, and that at night, in this area, many hoboes and tramps, white and colored, 'hop freight trains and get rides out of there.' Such situation was likely the reason for Haney having a pistol. The police homicide squad made an investigation of Haney's death and the measurement referred to, supra, in the evidence of Bruso, was made by the police in Bruso's presence. Six days after Haney was killed his billfold was found on a high board fence railing about a block from the place where Haney was killed. It contained no money, but contained Haney's social security card and other things. The billfold was not soiled: 'it did not appear to have been lying out in the rain or snow.' It was

found near the place where Haney was placed in the ambulance. Haney had a gold watch and a diamond ring. These were 'still on him at the hospital. He never carried much money, not very much more than \$10' " (189 S. W. [2d] 253, l. c. 257, R. 329).

Following the requirements in Section 2 of Rule 38 pertaining to a petition for writ of certiorari and supporting brief, this Court cites a number of cases holding that, "A failure to comply with these requirements will be a sufficient reason for denying the petition." Most frequently cited among these cases is *Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n.*, 242 U. S. 430, in which this Court, in speaking of petitions for certiorari, at page 434 of the opinion, said:

"Unless these are carefully prepared, contain **appropriate** references to the record and present with **studied accuracy, brevity and clearness** whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its dockets."

II.

The holding of the Supreme Court of Missouri that the evidence was insufficient to show that the mail hook struck Haney except by resorting to speculation and conjecture is in accordance with the applicable decisions of this Court.

In our "Grounds Urged in Argument in Opposition to Petition for Writ of Certiorari" we have cited a number of decisions of this Court on this point. We shall omit quotations regarding the particular facts and holdings in these cases. They contain the applicable principles of law and hold, as did the Supreme Court of Missouri in the instant case, that verdicts cannot be based upon speculation

and conjecture. We submit that the facts in each of these cases were more favorable to the plaintiff than in the instant case.

Even though it could be found without resorting to speculation and conjecture that the mail hook struck Haney, what would be the actionable negligence of Trustee defendants? The mail car was next to the engine, and as this train of twelve cars backed into the station it was the ~~eleventh~~^{twelfth} car to pass Haney (R. 145, 149). There is no charge, and there is not a scintilla of evidence that the mail hook was defective, or that the track was defective, or that the train was backing at a dangerous or unusual speed.

CONCLUSION.

It is respectfully submitted that the decision of the Supreme Court of Missouri is in accordance with the applicable decisions of this Court, and that the petition for writ of certiorari should be denied.

MAURICE G. ROBERTS,
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IN THE
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OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator
de bonis non of the Estate of L. E.
Haney, Deceased,

Petitioner,

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COMPANY, Debtor, and ILLINOIS
CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.

SEPARATE BRIEF

Of Illinois Central Railroad Company (a Respondent
Herein) Opposing Issuance of Writ
of Certiorari.

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IN THE
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OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator
de bonis non of the Estate of L. E.
Haney, Deceased,

Petitioner,

vs.

J. M. KURN et al., Trustees of ST.
LOUIS-SAN FRANCISCO RAILWAY
COMPANY, Debtor, and ILLINOIS
CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.

SEPARATE BRIEF

Of Illinois Central Railroad Company (a Respondent
Herein) Opposing Issuance of Writ
of Certiorari.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked by petitioner under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937, U. S. C. A., Title 28, Section 347.

This Court undoubtedly has jurisdiction to consider and grant the writ herein prayed for, if, in the judgment of the Court, the record in the case in the Supreme Court of Missouri, justifies the issuance of the writ, which this respondent denies.

OPINION OF THE COURT BELOW.

It is correctly stated in the brief of petitioner that the case in which the Supreme Court of Missouri rendered its opinion is reported in 189 S. W. (2d), at page 253, and appears on pages 320-331 of the transcript of the printed record filed by petitioner in this Court.

STATEMENT OF THE CASE.

While the history of the litigation—that is, as to the various proceedings, filing of pleadings, trial of case, appeal to Supreme Court of Missouri, decision by that Court, filing and overruling of motion for rehearing—is correctly set forth in the petition filed in this Court, this respondent is by no means satisfied with the statement of facts set forth in petitioner's petition for writ of certiorari. On the contrary, as this respondent will show to the Court, there are glaring errors in said statement of facts and for that reason the statement is exceedingly unfair, so that it is deemed necessary to make a full statement of the evidence, and thereafter to set forth corrections of erroneous statements made by counsel for petitioner.

The Evidence.

Haney's employment was that of a switch tender. It was a part of his duty to regulate certain overhead signal lights which were controlled from the shanty in which he had his office, and which governed the movements of certain trains.

On the evening in question, shortly before 7:30 o'clock, Haney set the lights from his shanty so that they would show red and stop north and south bound traffic in the Illinois Central terminal yards and would permit a Frisco interstate train from Birmingham, Ala., to Memphis, Tenn., to cross over the Illinois Central tracks in the terminal

yards, and then proceed westwardly until it passed a certain long switch which was west of the terminal yards. Haney then threw that switch so that the Frisco passenger train could back over it eastwardly into the terminal yards and then northwardly into the Grand Central Station. It was Haney's duty to remain near the switch until the entire train passed completely over the switch point and passed the switch stand, and then throw the switch back again and see to it that the light on the switch was changed from red to green. While waiting for that train to pass, Haney's proper place was on the south side of the track. His next duty was to go back to his shanty, about 300 feet to the east, and change the overhead lights so that they would show green for north and south bound traffic in the terminal yards (Rec. pp. 32, 33).

After the Frisco train passed over the switch all of the lights remained red. Therefore, Brusco, foreman of one of the switching crews, whose engine had been stopped by the overhead lights, went to the switch stand and found Haney lying unconscious north of the Frisco track and west of the switch stand. He returned to the yard, sent a man to call for an ambulance, and took another switchman (Bundy) back with him to where Haney was lying unconscious (Rec. p. 32). It was found that Haney had been struck in the back of the head, apparently by some blunt instrument which crushed his skull. He never regained consciousness, and was dead when the ambulance carrying him arrived at the hospital, to which he was sent.

One of plaintiff's witnesses (Gates) testified (Rec. p. 29) that many transients, both black and white, were around the railroad yards in the neighborhood of the scene of the accident in question, both day and night, seeking chances to steal rides on trains.

The switch track ran east and west near the place where Haney was found unconscious. When Brusco and Bundy arrived, Haney was lying on the ground, face down; was

a little north of the switch and a little west of it, his head pointed at a kind of an angle towards the south and his feet extended northward at kind of an angle. His head **was about six feet north** (Rec. p. 32) of the switch stand and a little to the west of it. **Haney was about 5 feet 10 inches in height and his feet were about ten feet north of the north rail of the switch track, extending straight back of him and not doubled under him**, so plaintiff's witness Bundy said (Rec. p. 32). There was evidence of an injury on the back of his head in the form of a gash about two inches long, which was bleeding. Brusco and Bundy turned Haney over and then discovered his pistol and his lantern under him. The switch had not been closed after the train had backed over it to the station and the red light on the switch stand was still showing. (Rec. p. 32).

The two men turned Haney around and raised his head and Bundy squatted down and took Haney's head on his lap and held it until the ambulance driver came to take him to the hospital (Rec. p. 33). There was no evidence of any other injury, except where Haney's face had struck the cinders. His watch and his diamond ring were found on him, but his pocket book with his money in it was missing. The pocket book was found a week later about two blocks from the scene of accident. Haney's money was gone.

Plaintiff had, long before the trial, taken the deposition of John Joseph Drashman, who was coach foreman for the Frisco Railroad, having charge of supervising repairs and anything connected with passenger cars. Drashman, being present at the trial, plaintiff called him as a witness.

He testified that he was on duty on the evening of December 21, 1939, at the Grand Central Station about half a mile north and east of the scene of the accident. Having been informed about 7:40 P. M. that an accident had occurred, Drashman went with the superintendent of termi-

nals, Mr. Young, on foot, down to the place where Haney had been found unconscious.

It appears that Drashman became very much confused at the trial as to what he had testified to in his deposition. It was shown that in his deposition he had testified that he made two trips to the scene of the accident, and that on the first trip he found Haney still on the ground, unconscious, at the scene of the accident; that he returned to the station, made an inspection of both sides of the train, found nothing swinging out from it or extending out from it (Rec. p. 75), and then came back to the scene of the accident, and by that time Haney had been sent to the hospital. At the trial Drashman positively denied that he made more than one trip to the scene of the accident and said that Haney had been removed before he got down to the scene, and, therefore, he did not see Haney at all, but he gave the same testimony as to inspection of the train as he had given in his deposition.

Both in his deposition and at the trial Drashman was permitted to testify, over strenuous objections by all of the defendants, through their counsel, that while he was investigating at the scene of the accident, some unknown person, whom he took to be an I. C. railroad switchman, stated in his hearing in a group of men who had gathered there that he thought that something sticking out from the side of the train had struck Haney and injured him. Both in his deposition and at the trial Drashman said that he did not know who that man who made the statement was, but that said man did not claim to have been present or to have seen the accident happen (Rec. pp. 48-62).

These statements of Drashman, as to what was said by an unknown man at the scene of accident, were objected to as hearsay, but were admitted by the court on the theory that they constituted a part of the *res gestae*.

The baggage cars and the mail car had sliding doors which are on the inside about six inches from the outside

of the cars, and the Pullmans and day coaches all had vestibule doors which opened toward the inside of the cars. There were, of course, no freight cars in that high class passenger train (Drashman's testimony, Rec. p. 67).

There was a railroad track used by two other railroads than the Frisco, about 25 feet north of the Frisco switch. About midway between those two tracks was an accumulation of cinders and dirt about 18 inches to two feet in height and running a considerable distance east and west, which resulted from the accumulation of sweepings from the two tracks.

The hospital record of St. Joseph's Hospital in Memphis was offered in evidence and showed that Haney was dead when he arrived at the hospital. In the history of the case contained in the hospital record it was stated that there was an abrasion to the right posterior part of the head approximately five centimeters long and one centimeter wide with depression of the skull under the abrasion involving occipital and parietal regions, and that cinders were ground into the skin on the right side of the face (Rec. p. 78).

The report of the autopsy showed no injuries other than those above mentioned (Rec. p. 79). It was recited that there was a traumatic fracture of the skull with associated meningeal hemorrhage.

The physician who examined Haney to ascertain whether he was dead or alive when he arrived at the hospital (Dr. W. E. Turner, Jr.), testified for plaintiff that he was the one who had made the record and he was present when the autopsy was performed. He testified: "Our conclusion was that the skull was fractured by some fast moving small, round object. I guess it would be possible for that small round, fast moving object to have been a rod or something projecting out from a train that was going 8 or 10 miles an hour. I don't know anything about it, but I think it could be. Maybe an iron pipe." He said in cross-

examination: "It is very possible, in my opinion and judgment, that this man could have suffered a blow by some, maybe, gas pipe or club or other similar round object also in the hands of some individual" (Rec. pp. 78-79).

C. Bruce Farmer, a railway postal clerk who had been employed by the United States Government on railway postal cars for many years, was called by plaintiff as an expert witness to show the structure of mail catcher arms on the sides of mail cars (Rec. pp. 96-101).

He testified that such cars vary from 30 to 60 or 70 feet in length. He identified Defendants' Exhibits C and D (Rec., opposite p. 120) as correct photographs showing such a mail catcher arm, Exhibit C showing it down at the side of the car while not in use, and Exhibit D showing it when raised in such position that it can catch a mail pouch above a station platform. He testified that he had measured several such mail cars and the space between the level of the ties of a track on which the cars stood and the bottom of the mail catcher arm when not in use. He found that on the Frisco mail car which he measured the distance was 80 inches from the level of the ties to the lower end of the mail catcher arm when down, and when the same arm was swung out into position to catch a mail pouch, it was 87 inches from the top of the ties to the mail catcher arm (Rec. p. 97).

In all his experience he had never known such a mail catcher arm, when hanging down at the side of the car, to swing out more than a foot from the side of the car (Rec. p. 97), and it did that only in the event that the train was being very rapidly run or was going around a curve. When the door was open, and only when it was open, a mail clerk inside the car could catch hold of the lever above the cross-piece of the catcher arm and pull it inward and downward and cause the mail catcher arm to swing up into position to catch a mail pouch, and it would

then be about 9 feet above the top of ties, and extend out about 30 inches from the side of the car (Rec. p. 99).

Haney's son testified that on the morning following the accident he saw a spot of blood (at least he took it to be blood) on the cinders about six or eight feet east of the switch stand in question and three or four feet north of the rail and that the ground north of that point for some distance east and west was rough and uneven (Rec. p. 93).

Evidence as to Employer of Haney.

In an effort to prove that Haney was an employee of the Illinois Central Railroad Company, plaintiff's counsel, while the widow of Haney was on the witness stand, offered in evidence the pay checks for Haney's wages, which checks were twelve in number, covering periods of two weeks each from July 15, 1939, through the second period of December, 1939, the last check being dated December 30, 1939 (Rec. pp. 86-87).

All of these checks were payable to L. E. Haney, and all but the two for two periods in December, 1939, bore Haney's endorsement, which was identified by the widow, who testified that he got the money represented by all of those checks except the one dated December 15, 1939, and the one dated December 30, 1939, which last two mentioned checks were paid to her after Haney's death, by a special arrangement which she made with the Yazoo and Mississippi Valley Railroad, whereby she was permitted to endorse and collect those two checks (Rec. p. 91).

Except as to the dates, the periods covered and the amounts, the checks were exactly alike. A photostatic copy of a specimen of the checks will be found on page 105 of the record. It will be seen that at the top of the check are the words, "The Yazoo & Mississippi Valley Railroad Company." In the lower left-hand corner are the words "To Treasurer, The Yazoo & Mississippi Valley Railroad

Company" and the names of three banks, one in Chicago, one in St. Louis and one in Memphis, are given as banks through which the checks are payable.

An emblem of the Illinois Central System is found in the upper left-hand corner with the words "Illinois Central" printed across the emblem. At the bottom of the check is printed a similar emblem with the same words, and at the right of those words is the name "G. C. Lyon," both the last mentioned emblem and the name being under the word "Countersigned." In the right lower corner are the words "R. E. Connelly, Treasurer." On the back of each of the checks except the last two is the signature "L. E. Haney," which Mrs. Haney identified. On the last two checks dated December 15, 1939, and December 30, 1939, respectively (one of which is reproduced by photostatic copy opposite page 104 of the record), the following appears: "Pay to the Order of Mrs. L. E. Haney, Account deceased. The Yazoo & Mississippi Valley Railroad Company, A. E. Huttig, Assistant Treasurer, Countersigned G. C. Lyon." Then appears the endorsement, "Mrs. L. E. Haney."

Mrs. Haney further testified: My husband had a little button that he wore.

Q. What did the button say on it? A. I think it was the lodge he belonged to.

Q. Did it show any name or anything? A. I thought it had YMV on it.

On the same subject, Haney's son, Alvin Arthur Haney, (Rec. p. 93) testified that he worked with his father during the Christmas season before his death. He said: "As far as I know, I thought I was working for the L. C. Railroad. I say that because I was hired in the Grand Central Station, the Illinois Central Station, and that was where I was paid by checks. I say I worked for the same railroad my father worked for because he got me the job and it was right down there with him. I got paid, as far as I

remember, the same place he got paid. We got our checks in the Grand Central Station. I don't know whose office it was we went into. I didn't pay any attention to any signs on the office.

I saw my father wearing a button, an insignia of some kind, while I was there. As far as I remember, I thought it had 'Illinois Central' across the top of it, 'Railroad Brothers Trainmen' or something. He wore that on his cap while he was working."

On the same subject the daughter, Mrs. Marjorie Haney Linsom, testified: "I have seen my father wear a button when he worked. It was a round button and it has 'Illinois Central' or 'I. C. Railroad' on it. It was just the initials 'ICRR.' He wore the button on his cap. He had a railroad pass and on that was 'The Illinois Central.' He had had it for several years, he had it for my mother and my brother and myself. I rode on it a number of times. It was renewed from time to time * * *. My mother or I could ride on that pass. We rode on it on the Illinois Central, and when we went on any other road we got a foreign pass, they call it. We could not ride on the Illinois Central pass on another road. The pass was made out to Lyman E. Haney, employee. All I can remember that was on it was that it had 'Illinois Central' on it and it was issued to L. E. Haney, Employee. * * *. I believe the pass that I speak of had the name 'Illinois Central System' on it. I didn't see that it had Y&MV on it also. I never saw the button that my father wore on his coat or vest. The one on his cap had 'Brotherhood of Trainmen' on it. It did not have 'IC System' on it. It did not have Y&MMV on it. It had 'ICRR Brotherhood of Trainmen.'"

There was no evidence offered tending to show that the place where Haney was killed was inside of the terminal yards covered by the contract above mentioned or that said place was in anywise owned or controlled by the defendant Illinois Central Railroad Company.

It was admitted that the passenger train for which Haney had thrown the switch ^{very} shortly before he was killed was operated by the Trustees of the Frisco, who had been regularly and duly appointed, and that said train was an interstate train operating between Birmingham, Ala., and Kansas City, Mo., through Memphis, Tenn., and that, therefore, both Haney (in throwing the switch) and said defendant trustees were engaged in interstate commerce; and it was also admitted that the Illinois Central Railroad Company was engaged in operating trains through various states at said time.

Defendants' Evidence.

On the part of the defendants the evidence tended to show the following facts:

When Brusco, I. C. switching foreman, went to the scene of the accident, as above stated, to learn why the switch light was not changed, he found Haney (Rec. p. 110) **14 feet west of the switch stand and his head was lying five feet nine inches from the north rail of the track and his feet were straight back of him 13 or 14 feet away from said north rail. There were two marks on the little mound of dirt and cinders which indicated that as he fell forward Haney's feet dragged down the south side of the mound, and those marks were plainly visible the following morning.** His drawn pistol and his lantern were under him. Brusco and Bundy, whom Brusco had promptly summoned to help him, turned Haney over and **turned him around so that he was lying either on the mound or on the edge of it with the length of his body approximately east and west, and Bundy raised Haney's head,** as already mentioned in an earlier part of this statement (Rec. p. 11).

Brusco then went to the shanty where Haney had his headquarters, broke the glass in the locked door (Rec. p. 111) and reached in and changed the overhead lights so

that north and south bound traffic could proceed, and then he went on in the discharge of his ordinary duties.

About eight o'clock that evening Ora L. Young (a witness called by defendants), the Superintendent of Terminals for the Frisco in the Central station, went with Drashman to the scene of the accident. Only one trip was made down there. As they were on their way down there Mr. Young looked the train over on both sides and found nothing whatever out of order, no open doors, nothing swinging or projecting from the train, and nothing at all unusual on either side of the train.

On returning from the scene of the accident Mr. Young carefully inspected two cars which had been left in Memphis by Frisco train No. 106, a baggage car and the mail car (Rec. p. 124). He made a particular examination of the mail car at that time and testified fully as to the condition of the mail catcher arm which he had not been able to inspect before, because there were men working inside of that car whom he did not want to disturb. Everything about the mail catcher arm was in its usual condition (Rec. pp. 132-133).

On the morning following the accident Brusco accompanied two city police officers and a special agent of the Frisco Railroad to the scene of the accident and pointed out to the police officers the place where Brusco had found Haney lying. A white pencil was placed at the point where the spot of blood coming from his head had been found and another pencil at the point where his feet were found. A photographer was present and he took two photographs of the scene, which are reproduced in the record as Exhibits A and B, respectively, and will be found opposite page 120. The two white pencils show very plainly in Exhibit B.

As to the employment of Haney, the evidence on the part of the defendant Illinois Central Railroad Company showed very clearly that Haney was employed exclusively

by the Yazoo & Mississippi Valley Railroad Company and was carried on the payroll of that company for many years. His superior, the trainmaster, Mr. Burns, who had been employed exclusively by that railroad for many years, testified that he knew Haney and knew that he was employed by that railroad alone.

The evidence showed there are three railroads embraced in the system known as "Illinois Central System," to-wit: Illinois Central Railroad Company, which operates a line of railroad from Chicago, Illinois, to Memphis and points farther south; Yazoo & Mississippi Valley Railroad Company, which is a separate railroad corporation and operates a system of railroads in and about Memphis and other points in the South, and the Gulf & Ship Island Railroad, which operates a railroad in the southern portion of our country.

The Yazoo & Mississippi Valley Railroad Company, at regular intervals, billed the Illinois Central Railroad Company for two-twelfths of Haney's wages, representing the time he was employed in throwing switches and setting signal lights for the Frisco Railroad trains (Rec. p. 130); the Illinois Central Railroad Company paid those bills and in turn collected said two-twelfths of Haney's wages from the Frisco Trustees, pursuant to the terms of the contract above mentioned (Rec. pp. 129-130).

Haney's wages were paid to him at all times by the Yazoo & Mississippi Valley Railroad Company. He was employed by that company alone (Rec. p. 159).

The button worn on Haney's cap was a button such as the Brotherhood of Railroad Trainmen furnished to all its members every month, regardless of the railroad by which they were employed. They were used as evidence to other men to show that their dues were paid up to date. No such button ever bore the name or the initials of any railroad company. A sample of such button is reproduced by photostat opposite page 128 of the abstract. The wording

on it is "100% for my country and brotherhood," which legend begins near the rim of the button on the left side and runs over the top to the right side. At the bottom of the button is "Feb. 1943." In the center of it is a capital letter "T," which stands for trainmen, and that letter is in the center of a representation of the spokes of a wheel.

By the Frisco engineer, Mee, who was in charge of the engine on that same train, it was shown (Rec. pp. 146-147) that as the train moved backward towards the station onto the switch he was looking towards the rear of the train in an easterly direction and could see along the side of the train a considerable distance. He saw nothing projecting or swinging from the mail car or any other part of the train, and did not see Haney or any other person on the north side of that switch as the train passed over it.

It was also shown by Mee (Rec. p. 151) that rule 104 of the standard rules for train operations requires a switch tender under such circumstances as existed at said time and place, after throwing the switch to cross to the opposite side of the track and wait until the train passes.

Similar testimony was given by the witness Bruso when he was recalled to the stand after having given a part of his testimony (Rec. p. 153).

There was not a particle of evidence anywhere in the entire record showing or tending to show that this respondent owned or controlled the track on which the Frisco train was being operated on the night of Haney's death, or that it owned or controlled in any way the ground on which such track was located or the ground on either side thereof. On the contrary, the undisputed evidence clearly showed that said track was laid in a public street of the City of Memphis, Tennessee (Rec. p. 126).

**CORRECTION OF ERRONEOUS STATEMENTS OF
FACT IN THE PETITION AND IN THE BRIEF
FILED BY PETITIONER IN THIS COURT.**

1. On page 5 of the petition, in the third paragraph on said page, it is erroneously stated that the evidence shows that Haney was killed * * * "by interstate Frisco passenger train No. 106."

There is not a word in the entire record which bears out such a statement. No one testified that he saw Haney struck by any train or anything else, and the facts brought out in the evidence afford no circumstantial evidence which justifies such a conclusion.

2. On page 6 of said petition and in the first paragraph on said page, it is stated "during the time the train was backing past Haney at about eight or ten miles an hour, something struck Haney in the back of the head, knocking him to the ground and rendering him unconscious."

This is a mere surmise by plaintiff's counsel. No evidence shows that Haney was struck while the train was passing him. The only direct evidence as to where Haney was while the train was passing him is that of the witness Creagh, the Frisco conductor, who was on the east platform at the east end of said train, and who testified that after throwing the switch Haney crossed to the south side of the track and was there when the conductor last saw him as the train passed.

3. On the same page (6) of said petition and in the second paragraph thereof, there is a statement as to what Dr. Turner, the hospital witness who pronounced Haney dead on his arrival at the hospital and was present at the autopsy testified. It is set forth thus by plaintiff's counsel on said page: "That in his opinion, Haney's injury and death was caused by a small, round, fast moving object striking Haney in the back of the head, which could have

been a rod fastened to a train backing at the rate of eight or ten miles an hour." In support of that quotation counsel cite pages 283 and 286 of the record.

Turning to said page 283, we find this question by plaintiff's counsel: "Q. Now, in your opinion, could that small round fast moving object be a rod or something projecting out from a train that was going eight or ten miles an hour?" After objection the doctor answered as follows: "A. I guess it would be possible, as far as I know about it, but I don't know anything about it, and I think it could be."

In cross-examination and on page 288, the witness further testified: "Q. And it is very possible then, in your opinion and judgment, that this man could have suffered a blow by some, maybe, gas pipe or club or some similar round object? A. Yes. Q. Also in the hands of some individual? A. Yes, it could be."

4. On page 7 of the petition herein in the first paragraph of said page, it is stated that plaintiff's witness Farmer (the railway mail clerk called as an expert by plaintiff) testified "that the mail hooks were not fastened at the bottom and would pivot and swing out 12 inches on the sway of the train."

But in explanation of that statement, in cross-examination, the same witness said (Rec. p. 98): "In backing in at a speed of ten miles an hour or less, over a switch if the track was smooth that would not throw the mail catcher out from the bottom of the car at all, but if the track was wavy, it might."

No evidence was offered to show that the track was wavy or otherwise in bad repair.

5. On page 7 of the petition filed herein, it is stated "witness Drashman testified that the mail hooks could swing out three feet from the side of the train." That is an incorrect quotation from the testimony of the witness

on that subject on page 269 of the record. The following questions and answers on the subject are found on that page of the record as follows: "Q. And how does that work? A. One side of it is fastened through brackets down against the side of the car, with a handle on top. Q. Can that be extended out to the side of the train? A. Yes. Q. How far out to the side of the train can that mail hook be extended? A. You can swing it out three feet."

The testimony as quoted would indicate that Drashman had said that the hook could swing out by itself a distance of three feet, but upon examining the questions and answers it clearly appears that he was testifying how a man could swing it out, which he explains elsewhere by saying that a clerk inside of the mail car could take hold of the lever when the door is open, pull down on the lever and thus swing the hook out.

It appears from the testimony of that same witness on page 73 under examination by plaintiff's counsel that he testified that the hook can be extended out to the side of the train, you can swing it out three feet to the tip end of the hook.


And on page 74, testifying in regard to the same mail catcher arms or hooks, the witness said "They do not sometimes swing out from the side of the train, the weight holds them against the side of the car." And on page 75 of the record, the witness said "There is no way to move that handle except as the U. S. mailman in the car moves it. It moves from in the doorway. In other words, he presses down on the handle on the inside of the car, and that brings the pouch catcher up on the outside about 8 feet above the rail. * * * you can raise them up, but they will not swing out with the motion of the car."

6. Near the bottom of page 7, of the petition, a statement is made that a light was erected over the switch immediately after the accident.

The statement on which counsel for petitioner base that statement is found in the testimony of plaintiff's witness Gates (Rec. p. 27) as follows: "There were no lights there and none near there. There has been light put up since then right near this spot where Haney was killed. It wasn't there at the time when he was killed. It is near the switch and shines on or near it. Elsewhere plaintiff's counsel state that the light was erected by the respondents herein (Pet. p. 24), but there is no evidence to justify such a statement. Since the scene of the accident was in a public street of the City of Memphis, the only fair inference is that any additional light which was erected after the accident was erected by the authorities of said city.

In support of his statement about the light, plaintiff also says on page 7 of his petition, that such evidence is found in the evidence of the witness Mee, pages 309 and 310 of the record. But the record at that place clearly shows that the statement on that subject by Mee was purely voluntary and was stricken from the record by the court on motion of respondents herein.

7. On page 13 of plaintiff's petition herein, it is stated that the opinion of the Supreme Court held that a mail hook could have struck Haney but that it did not. That is an unfair statement of the holding of the Missouri court. At page 325 of the record, it will be found that the Supreme Court said: "It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 inches." But the court holds that there was no substantial evidence to show that Haney was standing at a place where he could have been struck by said mail hook. The court then held in the last paragraph of its opinion (Rec. p. 331) that it would be mere speculation and conjecture to say that Haney was struck by the mail hook and that therefore the plaintiff



failed to make a submissible case. The court did not hold, as stated by petitioner, "that a mail hook could have struck Haney but that it did not." The court made no finding as to whether the hook did or did not hit Haney, but held, as above stated by us, that "That it would be mere speculation and conjecture to say that Haney was struck by the mail hook."

On page 17 of the petition it is erroneously stated "that after the train passed he was found unconscious lying face down within 5 to 6 feet from the track over which the train had passed, with his head pointing in the direction of the movement of the train." The only witness called by plaintiff who was present before Haney was turned around by Bundy and Brusso, was the witness Bundy, it appearing that nobody else arrived at the scene until they had turned the body around. Therefore statements by Drashman and Gates as to where they saw the body lying when they got there are in no wise helpful in determining how Haney was struck. Neither Brusso nor Bundy testified that Haney when found was lying with his head pointed towards the east in the direction in which the train was moving. Plaintiff's witness Bundy said (Rec. p. 32) his head was pointed south, kind of on an angle. The Frisco track runs east and west at that point. Haney's head was pointed a little south and east and his feet extended northward, kind of on an angle, and straight back of him and his feet were about 10 feet north of the north rail while his head was about 6 feet from the switch, and a little to the west.

On page 18 of the petition, is this statement: "There was no evidence of any kind that anything else could have killed Haney." That statement is not correct. Plaintiff's own witness, Gates, testified (Rec. p. 29) that at the period covering the accident, he knew there were large numbers of hobos, tramps and transients about those tracks at night attempting to hop trains to get rides on them. Both white

and colored transients of the character mentioned were around there day and night.

Haney's pistol was found under him when he was turned over by Bundy and Brusso and it was either on or very near his hand, and his lantern was also under him.

While Bundy expressed the opinion that the pistol might have fallen out of his pocket, there is no evidence that it did so, and on the contrary, his widow testified that he carried his pistol in a holster (Rec. p. 90).

8. The statement on page 20 of the petition to the effect that when mail hooks on mail cars round curves they will swing outwards a distance from 12 inches to 3 feet from the side of the car is not supported by the evidence. While Farmer testified that they can swing out a short distance he said (Rec. p. 97) "they won't swing out more than 12 inches without that (referring to their being moved by the mail clerk)." In the sentence immediately preceding that he said: "If the door is open, they can swing out as far as 26 inches to 3 feet, but they won't swing out unless somebody pulls them up; somebody has got hold of the handle and pull them up."

On page 23 of the petition, counsel say "We submit the evidence on this point was clear and positive, that the Illinois Central switchman had said that: 'something sticking out from the train hit Haney' and 'that is true.'"

That statement is quite misleading. Referring to page 255 we find the portion of the redirect examination of Drashman referred to above. What occurred was as follows:

"Q. You said a moment ago that the man who made the statement that something sticking out from the train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.

Q. That is true, isn't it? A. I think so, no one else was around there but I. C. men at the time."

It is perfectly plain from the context that Drashman was being asked if it was true that he had made the statement in his testimony to the effect that the unknown man in question was, in his opinion, an Illinois Central switchman, and that his statement that it was an Illinois Central switchman who quoted the statement of the unknown speaker to Drashman was an Illinois Central switchman, not that the statement was true, as the way in which counsel sets up the quotation on page 23 would indicate.

On page 37, in their brief herein, counsel again erroneously state that the evidence showed that when Haney was found his head was pointing in the general direction in which the train had just backed in. The evidence of Bundy in cross-examination, which is found on page 216, and cited by petitioner's counsel, does not bear out that statement, but contradicts it squarely, for the following questions and answers on that subject are found on page 216:

“Q. How far was his head north of the north rail of the track? A. I would say about 5 feet, 5 foot and a half.

Q. And then his feet were something like 5 feet or so on north of that? A. Yes, sir.

Q. From his appearance, did he appear to have fallen forward or backward? A. Forward.”

9. On page 38 of petitioner's brief herein, counsel repeat the erroneous statement that the mail hooks would pivot and swing out from the side of the car 14 inches to 3 feet. We have already corrected that statement and cited the record in support of our corrections under 8.

On page 41 of their brief, petitioner's counsel state that Drashman testified that Haney's body was lying parallel to the track over which the train had just been backed. At page 264 of the record, Drashman did testify that he thought that the whole body was lying about 6 feet north

of the track and that he believed his head was lying towards the west, but he said he was not sure.

It will be remembered that Bundy and Brusso had turned Haney over and changed the position of his body before Drashman or any other witness arrived.

On page 46 of their brief, counsel for petitioner again make the erroneous statement that when found Haney's body was lying with his head pointing in the direction in which the train had backed. This has been corrected by us repeatedly.

SUMMARY OF ARGUMENT.

I.

The trial Court erred in overruling this respondent's demurrer to the evidence at the close of all the evidence in the case, for the following reasons:

(a) The statements of an unknown man in the group gathered at the scene of the accident some time after it occurred, which the trial court permitted a witness for plaintiff to repeat, did not meet the requirements of the rule relating to admitting statements as part of the res gestae, and, therefore, constituted no substantial evidence whatever as to the way in which Haney was fatally injured. There was no other evidence to show how he was injured; hence the demurrer to the evidence should have been sustained.

The evidence offered by plaintiff conclusively showed that nothing sticking out of the train or swinging from it struck Haney.

(b) Even if it could be said that plaintiff's evidence tended to show that some object protruding from or swinging from the train might have struck Haney, or that his death was just as probably due to another cause, but the evidence failed to point clearly to the true cause of his death, such evidence would not be enough to justify submitting the case to the jury, and the Supreme Court of Missouri was right in so holding.

(c) Even if the evidence had shown that Haney's death resulted from being struck by an object projecting or swinging from the Frisco train, the accident would have been so unusual that it could not reasonably have been foreseen by a reasonably prudent person in this respond-

ent's situation in the exercise of ordinary care, and, for such an accident, a defendant is not liable. Hence, this respondent's demurrer should have been sustained.

(d) A master cannot be held liable for injury to a servant which results from a defect in an appliance or in a working place furnished the servant, unless it is shown that the master had either actual knowledge or constructive notice of such defect.

Neither actual nor constructive notice of an object projecting or swinging from the Frisco train was brought home to the appellant, Illinois Central Railroad Company, and hence respondent's case against it falls to the ground.

(e) There must be a duty owed and a breach thereof, before there can be negligence. The duty to keep the streets on which the Frisco track was laid properly illuminated, and free from obstructions, such as piles of gravel and cinders, rested upon the City of Memphis, not upon this appellant, for it had no control of the street and no duty or right to light it or remove piles of cinders or gravel from it, and hence this appellant could not be held guilty of a breach of such duty.

(f) The presence of the pile of cinders and gravel was not a proximate cause of Haney's death. He could have stood upon that pile of gravel and cinders safely all night if a separate intervening cause had not produced his injury and death. The proximate cause is what the law regards; and a causal connection between an alleged negligent condition or act and injury or death must be shown, or there can be no recovery on that account.

(g) The plaintiff sued the wrong railroad as Haney's employer. The suit was erroneously brought against Illinois Central Railroad Company. Documentary evidence identified by plaintiff's witness, Haney's widow, as well

as overwhelming and uncontradicted oral testimony offered by this appellant, showed conclusively that Haney's employer was not Illinois Central Railroad Company, but the Yazoo & Mississippi Valley Railroad Company, which was not made a party to this suit.

One who was not an employee of a defendant at the time of injury cannot recover damages of such defendant for such injury, nor can his personal representative maintain a suit under the Federal Employers' Liability Act for damages for his death.

ARGUMENT.

I.

The demurrer to the evidence at the close of the case should have been sustained because:

(a) ~~No admissible evidence whatever tended to show that Haney was killed by an object protruding from or swinging from the Frisco train.~~

The testimony as to a declaration by an unknown person in a crowd some time after Haney had been injured was admitted on the theory that such declaration constituted a part of the *res gestae*. Aside from that statement, the record is entirely bare of any suggestion of an object protruding or swinging from a car.

RES GESTAE.

Bouvier's Law Dictionary defines the term "*res gestae*" thus: "Transaction; thing done; subject matter."

Webster's New International Dictionary (2 Ed.) defines it thus: "The facts which form the environment of a litigated issue; the things or matters accompanying and incident to a transaction or event."

The Century Dictionary defines it thus: "Things done; material facts."

In order, therefore, for anything to be a **part of the *res gestae*** it must be a **part of the transaction or thing done or subject matter**; or a **part of the facts which form the environment of a litigated issue or of the things or matters accompanying and incident to a transaction or event**; or a **part of the things done or material facts**.

We find the following in Wigmore on Evidence, 3rd Ed., Section 1751:_____

“ * * * The declarant must appear to have an opportunity to observe personally the matter of which

he speaks. This requirement is in practice usually fulfilled in the case of all declarations otherwise admissible; for they are made by injured or others present and concern the circumstances of the injury as observed by them; and thus no occasion arises for calling attention to the requirement. Nevertheless, in an appropriate case, it would without doubt be enforced; for example, if a passenger in a railroad collision should exclaim 'the engineer did not reverse the lever' or 'the conductor did not read the train dispatcher's orders.' " (Emphasis ours.)

It is unnecessary to burden the court with a lengthy discussion of all the decisions, but we respectfully submit that, under the rule which is well established by such decisions and by eminent text-writers, the statements by the witness Drashman, called by the plaintiff in this case, to the effect that **some** man, who was **unknown** to him, standing in a little group of men which the witness reached after walking half a mile or more, following his learning of the accident, to the effect either that he **thought** something sticking out of the train struck Mr. Haney, or that something sticking out of the train struck him, or was supposed to have struck him, were clearly inadmissible.

Wigmore on Evidence, 3rd Ed., Sec. 1751;

Barker v. St. L., I. M. & S. Ry. Co., 126 Mo. 143;

Redmon v. Met. Str. Ry. Co., 185 Mo. 1;

Ruschenberg v. So. Elec. Ry. Co., 161 Mo. 70;

Bankers' Life Ins. Co. v. Reynolds, 277 Mo. 14, 1. c. 22-24;

Landau v. Travelers Ins. Co., 276 S. W. 376;

4 Chamberlayne on Ev., 2893;

3 Wigmore on Evidence, 2nd Ed., Sec. 1747;

Woods v. So. Ry. Co., 77 S. W. (2d) 374;

22 C. J. 462, Sec. 550;

Sconce v. Jones, 121 S. W. (2d) 777;

Johnson v. So. Ry., 175 S. W. (2d) 802;

32 C. J., Sec. 410, p. 24;

Hartford Fire Ins. Co. v. Kiser, 64 Fed. (2d) 288;

Vicksburg & Meridian R. Co. v. O'Brien, 119 U. S. 99;

Beck v. Dye, 92 Pac. (2d) 1113 (Wash.);

Schuman v. Bader & Co., 227 Ill. App. 28;

Hines v. Patterson, 225 S. W. 642 (Ark.);

Tex. Int. Ry. Co. v. Hughes, '53 S. W. (2d) 448 (Tex.).

Plaintiff's counsel convinced the trial court that such statements by an unknown person, **who did not even claim to have been present when the accident occurred or to have seen it** (Rec. pp. 48-61), were admissible as part of the res gestae.

Such statements were not admissible as part of the res gestae, because there was no evidence tending to show that the unknown man in the group was present when the accident occurred, and, in fact, the plaintiff's witness, Drashman, from whom such statements were elicited at the trial expressly stated that **the man who made the statements did not claim to have been there when the accident happened or to have seen it** (Rec. pp. 48-61). It was essential to show that he was present. That burden was on plaintiff.

The rule is that in order for such statements to be admissible they must have been made **contemporaneously with the happening of the accident or at a time so closely connected therewith that the witness had no time to reflect so as to make up a story that was not true**; or, if the person making such statement had been rendered unconscious in the accident, then no matter how long he was unconscious, if he made the statement so promptly after regaining consciousness that it was spontaneous and without time to manufacture an untruth, the statement may be considered a part of the res gestae.

Under the authorities the quoted statements could not be properly admitted, since the man who is alleged to have made them was not rendered unconscious, was not

suffering from the effects of any violence (since he was not the one who was hurt) was not shown to have any personal knowledge on the subject of which he spoke, and at most was relating his story of a past event.

In Chamberlayne on Evidence, Vol. IV, 2893, the following statement is found:

"To judicial administration, the automatic is the true. What a declarant asserts, not so much of himself as overborne and forced thereto by overwhelming emotion, the stress of sudden shock or intense pain, the law of evidence assumes to be the fact. That which judicial administration, nervous, as it were, at being deprived of the test of cross-examination, the greatest guaranty for the discovery of truth which the English jurisprudence has as yet been able to devise, fears in connection with such statements is reflection, the opportunity for adjusting facts to self-interest, consciously or unconsciously blending the true and false, coloring, distorting and preventing that which is real. In an instinctive automatic utterance, where the declarant speaks from his subjective or soul-mind rather than from the promptings of that which is habit, really conscious, this element of reflection is largely, if not wholly, absent. The speaker is not so much voluntarily declaring himself as instinctively reacting to an outside stimulus. More physically considered, it would rather seem that the transaction is speaking through the declarant than that the latter is consciously talking about the transaction."

Professor Wigmore, in III Wigmore on Evidence, 2 Ed., Sec. 1747, says:

"This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control; so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external

shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts."

The admissibility of a statement or an exclamation of a bystander is discussed in 32 C. J. S., Section 410, p. 24, as follows:

"In order for a declaration or statement to be admissible as part of the *res gestae*, it must appear that it was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made. As this rule implies, it is not necessary, in order to render a statement or act admissible as part of the *res gestae*, that it should have been made or done by one of the participants in the main transaction, but if it has the necessary connection with the main fact, it may be admissible no matter by whom it was made or done, provided, in the case of a declaration, it relates to a matter of fact to which declarant might testify if called as a witness. Accordingly, the exclamations or declarations of a mere bystander may be admissible as part of the *res gestae*, although there are numerous cases in which such declarations have been excluded." (Emphasis ours.)

Applying the rules and tests announced by the foregoing authorities, it seems too plain to require argument that evidence of the statements made by the unknown man who "looked like an I. C. switchman," according to the witness, should never have been admitted, but having been admitted, it should be treated as absolutely no proof at

all because having no probative worth whatever. The pages of the record on which those statements are printed might as well be blank pages, for the statements themselves are so utterly worthless that they cannot be considered in passing on the demurrer to the evidence.

Bearing in mind the rule to the effect that the statements must be **spontaneous** and that the burden of proving spontaneity rests upon the plaintiff who offers proof of such statements, let us see whether such statements were, under the evidence, spontaneous, or whether they were mere narration of a past event.

Did plaintiff bear the burden of showing that they were spontaneous utterances by a person who was present when the accident occurred and saw for himself what happened? That is the first question of all to be settled. The evidence absolutely fails to show any fact from which the jury could find that the man in the crowd who "looked like an I. C. switchman" was present when the accident occurred. The witness who testified that some man in the crowd stated that something sticking out from the side of the train hit Haney or that he **thought** something sticking out from the side of the train hit him, or that it was supposed to have hit him, expressly testified that **that man did not claim to have seen the accident** (Rec. p. 48). Not only did the plaintiff fail to bear the burden of showing that the unknown person was present, but he proved by his own witness that such unknown person **did not claim to have been present when the accident happened** (Rec. pp. 48-61). That fact in itself is sufficient to exclude the testimony, for if the man was not at the scene of the accident when it occurred, there could be no such thing on his part as a spontaneous utterance which was so closely connected with the happening of the accident when it occurred, that it could be said to be a part of the *res gestae*. That unknown man could not have testified to what he had not seen.

Again, plaintiff failed to meet the requirement of the rule regarding such evidence, because his own evidence expressly showed that the statements, if made at all, were made so long after the occurrence of the accident that the unknown man in the crowd making the statement had ample time to reflect upon what he had either seen or heard and to make up a story which may have been based upon his own conclusion from things that he saw after the accident happened, or from the statements of others, either as to what they saw or what they concluded from the facts that they learned.

The evidence of plaintiff's witness was that he was up at the station, which the evidence showed was more than half a mile away from the scene of the accident, when he learned that a man had been hurt down at the Frisco switch, which was the place near which decedent was found unconscious. This witness testified that he and another witness walked through the railroad yards, a distance of over half a mile, and when they got down to where the plaintiff's decedent was lying a gang of switchmen were there (Abs. p. 69).

It does not appear how long after the accident the news got to this witness. After somebody saw the injured man upon the ground the news in some undisclosed way eventually reached Mr. Young at the station, half a mile from the scene of the accident, and he told the witness and they walked to the switch. In addition to that, it will be recalled that it was sometime after the Frisco train had passed the scene of the accident before a witness from the railroad yards went up to the switch to see why the light had not changed after the train had gone in, and he there found Haney. All the time necessary for those things to happen had elapsed before the unknown man in the crowd made his statement.

Since the test of the admissibility of evidence of such statements is **spontaneity**, and since there is a total failure

of proof of spontaneity by plaintiff upon whom the burden of proof on that subject rested, it necessarily follows that the evidence of such statements should have been excluded, because it was mere hearsay. The most strenuous and repeated objections were made to such evidence, but the court continually overruled all such objections.

While it is true that the length of time elapsing after the happening of the accident varies in different cases, and it need not always be shown that the statement was made at the scene of the accident, nevertheless in every case it will be found that the statement must have been made **spontaneously at the earliest possible moment after the accident occurred.** A man may have been knocked unconscious in the course of an accident. He may not have come to for three or four days, but if, as soon as he is able to talk intelligently he makes a statement as to how the accident happened, if he saw it, and the surrounding circumstances show that the statement is made spontaneously without any opportunity or attempt to make up a story or color the facts in any way, then the test of spontaneity is met and the evidence may properly be received.

But in this case it is not claimed that the speaker in the crowd was rendered unconscious; on the contrary, he was not even shown to have been present when the accident occurred. Of course his statement to the effect that he **thought** some object sticking out of the side of the car had hit Haney was inadmissible because it was a mere expression of opinion. But if he said that something sticking out of the side of the train hit Haney that was just as inadmissible on account of the circumstances above mentioned.

Such statements do not amount to anything. A verdict cannot be based upon them. A court, because such statements were improperly admitted cannot consider them in passing upon the demurrer to the evidence. We do not have here a case (like some cases) where defendant's coun-

sel was asleep on the job and allowed the hearsay evidence to be admitted without objection. The record reveals the most determined and persistent efforts on the part of counsel of both defendants to keep such evidence out of the record. It was repeatedly objected to as hearsay; motions were made to strike it out after it was admitted; and motions to discharge the jury on account of the bringing out of such improper testimony were made, and an instruction was requested, withdrawing it from jury's consideration, but all to no avail. The trial Judge simply could not see our point.

The question of the admissibility of this evidence is not a Federal question. It should be left to the Missouri court for determination.

(b) Eliminating the statement made by the unknown man in the group standing around Haney while unconscious from his injury, which statement must be eliminated in view of all of the authorities above cited, what have we left in this case on which plaintiff can base a right of recovery? The theory of the third amended petition on which the case was tried was that something was sticking out of or swinging from the Frisco train as it passed the point where Haney was standing after he had thrown the switch on the occasion in question, and struck him.

We shall demonstrate under another heading that even if plaintiff had offered evidence tending to show that some object sticking out of or swinging from the train actually killed Haney, the appellant, Illinois Central Railroad Company, could not be held liable for Haney's death on that account.

But it is important now to consider whether or not there was any evidence tending to show some such object either sticking out of or swinging from the train which caused Haney's death.

The authorities which we shall presently cite, and many others which could be cited, make it perfectly clear that where the most that can be said in favor of a plaintiff's case is that the injury could have resulted from a cause for which defendant was liable, or that it could have resulted from a cause for which the defendant was not liable, and where the evidence leaves the matter entirely to speculation or guesswork to determine which cause did produce the injury, the plaintiff has wholly failed to make a case and it is the duty of the trial court to sustain a demurrer to the evidence; and if the trial court has overruled the demurrer under such circumstances, it is the duty of the appellate court to reverse the judgment outright, as ~~was~~ done by the Supreme Court of Missouri.

Aside from the statement of the unknown man in the group above referred to (which is to be disregarded as hearsay), plaintiff's evidence at most merely tends to show that Haney was standing some distance away from the switch track upon a pile of cinders and gravel when the train passed, or after it passed. **The undisputed evidence, offered by plaintiff, showed that Haney had been struck on the back of the head to the right of the middle line and his skull had been fractured at that point.**

This fact proved that he was struck from behind, for the evidence showed that he fell forward and that the point where his head lay when he was found unconscious was six or eight feet north of the north rail of the Frisco track, and his feet and legs were extended straight out towards the north or slightly northwest (see evidence of plaintiff's witness, Bundy, Rec. p. 32).

According to all the laws of physics and common knowledge, if an object had swung out from the train as it was passing Haney while he stood on the mound, it would either have hit him in the forehead and knocked him backwards so that he would have lain with his feet towards the track; or, if it swung out just before it got to him, or was sticking out of the train, it would have struck

the right side of his head and knocked him to his left, for the train was eastward bound as it passed him. If an object swung out and caught him on the right side of his head, or if it was stationary and was projecting straight out from the train and caught him on the side of his head, he would necessarily have been thrown to his left side so that when he fell his unconscious form would have been lying on his left side and parallel to the Frisco track.

Petitioner now claims that Haney was found lying parallel to the track; but that is squarely in contradiction of the evidence of plaintiff's own witness Bundy (Rec. p. 32) and that of defendant's witness Brusso (Rec. p. 110), the two men who found Haney. Brusso testified (Rec. p. 110) that Haney was found lying face down on the right side of his face, a fact which was corroborated by the hospital record which plaintiff offered in evidence (Rec. p. 78) and which showed that "the right side of Haney's face was covered with dirty cinders ground into the face."

There is no theory which the evidence tends to support which would justify a finding that something from the train struck Haney in the back of the head or on the right side of his head.

If an assailant quietly slipped up behind him with a drawn pistol or with a piece of pipe and struck him a violent blow upon the back of his head, it could easily have fractured his skull in the back part of his head and would certainly have caused him to fall forward and land just where he was found unconscious a short time later. Tough characters frequented that place constantly (Rec. p. 29).

Plaintiff's witness, Dr. Turner, testified the wound could have been caused by a gaspipe or club or similar round object in the hands of some individual (Rec. p. 79).

Even if it could be said that it was just as probable that something sticking out of the train or swinging from it inflicted the blow which caused Haney's death as that some unknown assailant struck him from behind, one state of facts being no more clearly shown than the other, plain-

tiff's case would necessarily fall to the ground because of the rule to which we have above referred.

- Hamilton v. St. L. & S. F. Ry. Co., 300 S. W. 787;
Bates v. Brown Shoe Co., 116 S. W. (2d) 31;
Pape v. Aetna Cas. Co., 150 S. W. (2d) 669;
Lappin v. Prebe, 131 S. W. (2d) 511;
Penn. R. R. Co. v. Chamberlain, 53 Sup. Ct. Rep. 391;
N. Y. C. R. R. Co. v. Ambrose, 50 Sup. Ct. Rep. 198;
C. M. & St. P. R. Co. v. Coogan, 271 U. S. 472;
Patton v. Tex. & Pac. Ry. Co., 179 U. S. 658;
C. & O. Ry. Co. v. Stapleton, 299 U. S. 587, 53 Sup.
Ct. Rep. 591;
A. T. & S. F. Ry. Co. v. Toops, 281 U. S. 351, 50
S. C. 281;
A. T. & S. F. Ry. Co. v. Saxon, 284 U. S. 458, 52
S. C. 229.

But when we add to that the physical facts showing that he could not have been injured by an object either protruding from or swinging from the train as claimed, in view of the injury found upon the back of his head and the position in which he was lying unconscious when discovered after the accident, it becomes all the more apparent that plaintiff wholly failed to establish the allegations of his petition as to how the accident occurred.

But the plaintiff went further and completely obliterated every chance of recovery on presumptions or circumstantial evidence by showing by Drashman, a witness whom plaintiff's counsel placed upon the stand, that said witness, after learning of the accident, inspected the Frisco train over its full length on both sides and that nothing whatever was found protruding from the train or loose on the side of the train so that it could have swung out as it passed the decedent (Rec. p. 67). This was corroborated by defendant's witness, Young (Rec. p. 123).

Discovering, no doubt, that he had completely ruined his case by the testimony of that witness whom he had put on the stand, plaintiff's counsel attempted to establish

the theory that the mail catcher arm which was fastened on the side of the mail car swung out from its position and struck Haney as it passed.

But that effort also ended in dismal failure, for the railway mail clerk whom plaintiff called as a witness and who was a man of vast experience, from which he had learned all about railway mail cars, how they are equipped and the position and action of such mail catcher arms, gave testimony which showed conclusively that, under no circumstances whatever, could the mail-catcher arm have swung out more than one foot from the side of the car; that the lowest part of it was eighty inches (6 feet 8 inches) above the ground (which would have been more than a foot above Haney's head if he were on the level ground), and that the only way the arm could be made to operate was by opening the door of the mail car and using a lever on the inside of the door of the car for that purpose. When raised it would be nine feet above the ground and extend thirty inches from the car (R. C. pp. 97, 99). There was no occasion to raise it, for there was no railroad platform anywhere near the scene of the accident and consequently nothing on which a mail sack could be hung so that it might be taken off by means of the mail catcher arm.

There was not even a scintilla of evidence tending to show that anything protruding from the side of the train or swinging out from the side of the train struck Haney, and plaintiff's own evidence showed positively that such a thing did not and could not happen.

This makes the plaintiff's case far more clearly one without any foundation than even the class of cases referred to where either of two causes might have produced the injury, but the evidence failed to point clearly to the true cause. This reason for holding that plaintiff could not recover is even stronger than the one assigned by the Supreme Court of Missouri.

(c) The Illinois Central Railroad Company, even if held to be the employer of Haney, could not be held liable in this case, even if his fatal injury was caused by some object sticking out of the Frisco train or swinging from it.

If the evidence had showed (as it did not) that some object protruding from the train or swinging from it fatally injured Haney, there certainly was no evidence anywhere in the entire record tending in the least degree to show actual or constructive notice on the part of the defendant, Illinois Central Railroad Company, of the presence of such object on the side of the train or swinging from it.

A defendant is not required to use his imagination—a very fertile imagination at that—to study up things that he can conceive might possibly happen, disregarding entirely ordinary human experience and his own experience.

Urie v. Thompson, Tr., 176 S. W. (2d) 471;

Brewing Assn. v. Talbot, 141 Mo. 674;

State ex rel. v. Ellison, 271 Mo. 463;

Nelson v. C. Heinz Stove Co., 8 S. W. (2d) 918;

Brady & So. Ry. Co., 320 U. S. 476, 64 S. C. 232.

Of the millions of trains that have moved throughout this country in many years past, only in the rarest possible instances has it ever been found that something protruding from or swinging from a moving train injured someone, and in the few cases we have found, freight trains were involved. There are a few cases where a freight car door or a refrigerator car door had a broken hinge which permitted it to swing and strike someone near the track, or an object of some kind loaded on a flat car protruded too far from the side of the train and inflicted injury. Such things are not the usual experience of railroads, but are extremely rare and unusual. The train in question was not a freight train, but a vestibuled passenger train (Rec. p. 67); there was no reason even to imagine that a freight car door would be swinging out or that an

object would be protruding too far from the side of a flat car, for there were no flat cars or box cars in the train, it being a fast passenger train; and it was not this respondent's train.

(d) So far as the defendant, Illinois Central Railroad Company is concerned, we must not lose sight of the fact that the train from which plaintiff claimed some unknown object was protruding or swinging was not being operated by the Illinois Central, but by the Trustees of the Frisco, which is an entirely different railroad corporation. Therefore, the Illinois Central Railroad Company had neither the duty nor the power to inspect that Frisco train, and could not, by any possibility have discovered, up to the very moment when it passed Haney, that it had an object protruding or swinging from it, if there was any such object.

Bailey v. Stix, Baer & Fuller D. G. Co., 149 Mo. App. 656;

Poe v. I. C. R. R. Co., 73 S. W. (2d) 779;

Hoover v. Baldwin, 111 S. W. (2d) 1011;

Kelley v. Railroad, 105 Mo. App. 365;

Creighton v. Mo. Pac. Ry. Co., 66 S. W. (2d) 980;

Sharp v. Cleaning etc. Co., 300 S. W. 559;

Krampe v. Brewing Co., 59 Mo. App. 277;

Wojtylak v. Coal Co., 188 Mo. 260;

Powell v. Elec. Co., 195 Mo. App. 156;

C. & N. W. Ry. Co. v. Payne, 8 Fed. (2d) 332;

Hicks v. Mo. Pac. R. Co., 40 S. W. (2d) 512.

There is no evidence in the record tending to show that the respondent, Illinois Central Railroad Company, had any actual knowledge of an object either protruding from or swinging from the Frisco train on the occasion in question. Where is there any evidence in the record tending to show that the defendant, Illinois Central Railroad Company, ought to have had such knowledge—in other words, that it had constructive notice? There is no

such evidence. How could the Illinois Central Railroad Company know, as the train of another railroad came backing towards its station in the nighttime on such railroad's track over a public street which was unlighted, that there was an object either protruding or swinging from the side of the train? There was certainly no duty on the part of the Illinois Central Railroad Company to inspect the train of the Frisco Railroad. It was beyond its power to do so, and, therefore, there could be no breach of duty in that respect.

Besides all this, we have proof made by plaintiff's own witness, Drashman, that the Frisco train was inspected at the station shortly after it arrived there and before it had been moved and **that there was no object sticking out of it or swinging from it.** There were no freight cars in the train, as above stated, the doors were vestibule doors, all of which opened inward on the passenger cars (Rec. p. 67), and the doors on the express cars and mail car were sliding doors which could be operated only from the inside of the train and could, in no event, swing out, and the mail catcher arm on the mail car was shown by plaintiff's own witness to have been so situated and equipped that it could not have swung out more than one foot under any circumstances (Rec. p. 97) unless an employee inside of the mail car opened the door and by means of a lever inside of the car deliberately raised the catcher arm, and, even then, it could not have hurt anybody standing beside the track, for, at the lowest point it was eighty inches above the ground, when raised it was nine feet above the ground and extended out only thirty inches (Haney was only 5 feet 7½ inches tall [Rec. p. 95]), and there was no place anywhere near the scene of the accident where there would be occasion to use the mail catcher arm to take a mail pouch off of a stand provided for that purpose, and Haney's head was six feet from the track after he fell forward (Rec. p. 32) toward the track, so he had been standing at least 11 feet from the track.

But even if plaintiff had made proof of something sticking or swinging out from the train and killing Haney, his case would have been wholly wanting in the necessary element of notice to this appellant, even if it was the employer of Haney, of the existence of any object protruding from the train or swinging from it, and, therefore, plaintiff's case would have been wholly insufficient because of utter lack of such proof.

Because of failure to prove notice to defendant, Illinois Central Railroad Company, its demurrer to the evidence should have been sustained.

(e) It is axiomatic that a defendant cannot be held for damages resulting from negligence unless some duty which rested upon the defendant has been breached.

In cases of master and servant, it is a well-recognized rule that, while a master owes to his servant the duty to exercise ordinary care to furnish him reasonably safe appliances and a reasonably safe place in which to work, the master is not liable on account of injuries resulting to his servant by the use of appliances not furnished by the master or by reason of dangers incident to a place which is not furnished by the master as a place in which to work and over which the master has no control, so that if it is dangerous he has no power or authority to change it.

This rule is recognized throughout this country.

Troth v. Norcross, 111 Mo. 630;

Andrus v. Bradley-Alderson Co., 117 Mo. App. 322;

Loehring v. Westlake Cons. Co. & Roebbling Const. Co., 118 Mo. App. 163;

Powell v. Walker, 195 Mo. App. 150;

Spurling v. LaCrosse Lbr. Co., 204 Mo. App. 29;

Pecher v. Howd, 273 S. W. 752.

Applying the rule in the foregoing cases to the facts in this case, we find that deceased was required by his employer (whoever that employer was, plaintiff claiming

it was Illinois Central Railroad Company, but his own proof showing that it was The Yazoo & Mississippi Valley Railroad Company) to go in the night time to throw a switch so as to permit a Frisco train to back into Grand Central Station in Memphis. Plaintiff's own evidence, however, revealed the fact that the switch which the deceased threw was a part of the equipment of the Frisco Railroad and the place where the deceased was standing when fatally injured was not on the Illinois Central property and the defendant showed it was **in a public street of the City of Memphis** (Rec. p. 136). Therefore, this respondent had no right or authority either to clean up the street and remove the pile of cinders and gravel upon which deceased was standing when injured, or to put up additional lights in said public street. Since there can be no right of recovery for negligence in the absence of the violation of a duty, as where the place to work is beyond the control of the master, it is certain that Illinois Central Railroad Company, even if it could be held to be the employer of Haney, could not properly be held liable to his administrator for damages growing out of his death.

(f) Since there is no evidence in the case tending to show that Haney was required by this defendant to stand upon the pile of cinders and gravel, and there was ample room between it and the track for him to stand while the Frisco train passed, and Haney was carrying a lantern, the presence of the pile of gravel and cinders was not a proximate cause of Haney's death, for he could have stood upon it in safety all night but for a separate, intervening act, for which this appellant was not liable and which it could not possibly foresee.

"Causa proxima non remota spectatur."

Harper v. St. L. Merch. Bridge Term. Ry. Co., 187 Mo. 575;

Brady v. So. Ry. Co., 64 Fed. (2d) 239, 320 U. S. 476;

Wecker v. Grafeman-McIntosh Ice Cream Co., 31
S. W. (2d) 974, l. c. 977;

Warner v. Ry., 178 Mo. 134;

Henry v. First Nat'l Bk., 115 S. W. (2d) 121;

State ex rel. Trading Post v. Shain, 116 S. W. (2d)
99.

(g) The Illinois Central Railroad Company, as was clearly and conclusively shown by plaintiff's own evidence, was not the employer of Haney.

We have carefully set forth in our statement of facts in this brief the evidence bearing on the subject of Haney's employment, and instead of repeating it here we respectfully refer the Court to that portion of our statement.

Pay checks for several months preceding Haney's death were identified by his widow and offered in evidence by her counsel. She testified that the endorsements on all except the last two of them were in Haney's own handwriting and that he got the money represented by the checks. As to the last two, one of them having been issued to him but not cashed before his death, and the other having been issued after his death, the endorsement on the back of each of those checks shows that by special arrangement The Yazoo & Mississippi Valley Railroad Company permitted Mrs. Haney to cash those two checks. Both the front and the back of the last check given, which covers the period from December 15, 1939, up to the date of Haney's death, have been reproduced by photostat and a copy will be found on page 105 of the Record.

Mrs. Haney's evidence shows that all of the other checks were precisely like the one of which a copy is reproduced in the abstract except for dates and amounts. Therefore, it was unnecessary to encumber the record with more than one copy, though they were all offered by plaintiff.

Plaintiff's counsel was able to confuse the jury about these checks because the diamond-shaped emblem of the

Illinois Central appears printed in two places upon them; the word "countersigned" appears upon the checks and part of that word is above the emblem and the name "Illinois Central" at the bottom of the checks. But the word "countersigned" evidently refers, not to the emblem and the printed name, but to the name of the person who countersigned the check and whose name was C. E. Lyon.

It is not at all uncommon for railroads to use a certain design on all their advertising matter and on their checks as well. For instance, we are all familiar with the banner that appears as the emblem of the Wabash, the keystone of the Pennsylvania, the triangle of the Alton, the red seal of the Missouri Pacific and the emblems used by other railroads, all of which refer to the entire system of which an individual railroad is a part. The undisputed evidence shows that the Illinois Central System is made up of three separate and distinct railroad corporations, one of which is The Yazoo & Mississippi Valley Railroad Company. It appears plainly on the face of the check in large letters at the top thereof that the check is that of The Yazoo & Mississippi Valley Railroad Company. The check is drawn on the treasurer of **that** company. The mere fact that an emblem with the name "Illinois Central" appears in two places on the check is wholly immaterial. Nowhere on the check does the corporate name of this appellant (Illinois Central Railroad Company) appear. Even if it had appeared from the evidence (which it did not) that The Yazoo & Mississippi Valley Railroad Company was a wholly owned subsidiary of the Illinois Central Railroad Company, nevertheless the entity of The Yazoo & Mississippi Valley Railroad Company would have remained wholly distinct from that of the Illinois Central Railroad Company, and the suit could not have been maintained against the Illinois Central Railroad Company for the negligence of The Yazoo & Mississippi Valley Railroad Company.

Plaintiff's attempts, through oral testimony of Mrs. Haney and her son and her daughter, to show that Haney wore a button with the name of the Illinois Central Railroad Company on it and that he had a pass issued by that company were not sufficient to establish the fact of his employment by The Illinois Central Railroad Company, as distinguished from The Yazoo & Mississippi Valley Railroad Company. The evidence of these three witnesses was so vague and contradictory that it proved nothing.

Then we have the testimony of the witness Bruso, who identified a button of the Brotherhood of Railroad Trainmen, a picture of which (Ex. 2) is found in the record opposite page 128, and the type of annual pass (Ex. 1), which is reproduced by photostat opposite page 119 of the abstract. Although Mrs. Haney and her son were called as witnesses in rebuttal, neither of them testified in rebuttal that the button and pass which Bruso had identified were different from those which Haney carried.

In addition to all that, Haney's superior, Mr. Burns (Rec. pp. 154-157), the trainmaster for The Yazoo & Mississippi Valley Railroad Company, whose duty it was to employ switchmen and switch tenders, testified positively that he was employed by The Yazoo & Mississippi Valley Railroad Company alone, and that he knew of his own knowledge that Haney, who was under him, was employed by that railroad company alone.

The testimony of Mr. Young, now in the employ of the U. S. Government but formerly superintendent of terminals for the Frisco, explained very clearly the relationship of the three railroads making up the Illinois Central System, and told how the bills were made out each month by the Yazoo & Mississippi Valley Railroad Company for the services rendered by Haney as a switch tender and how the Illinois Central Railroad Company was billed by the Yazoo & Mississippi Valley Railroad Company for such two-twelfths, which the evidence showed the Frisco paid the Illinois Central Railroad Company.

But even if Haney had been in the employ of the Illinois Central Railroad Company, when he was loaned to the Frisco Railroad Company, or hired to it, to perform certain duties, then when he engaged in those duties he was the servant of the Frisco Railroad Company and not the servant of the Illinois Central Railroad Company.

A very excellent and learned discussion of just such situation is found in an opinion by Chief Justice Taft in the case of *Linstead v. Chesapeake & Ohio Ry. Co.*, 276 U. S. 28, which held that an engine crew which was regularly employed by the Big Four Railroad Company but was turned over to the Chesapeake & Ohio Railway Company to do certain switching at a certain point, was, while doing such switching, in the employ of the Chesapeake & Ohio Railway Company, and when one of the men was injured he could not maintain a suit for damages under the Federal Employers' Liability Act against the Big Four Railroad Company, for which most of his services were rendered.

Other authorities support the same proposition. See:

Denton v. Y. & M. V. R. Co. et al., 284 U. S. 305, 52 S. Ct. 141, and cases therein cited.

There is no doubt whatever that the action in the case at bar is under the Federal Employers' Liability Act. That Act alone fixes the rights of employees who are injured or killed while engaged in interstate commerce. Plaintiff alleged that Haney and the defendant railroads were engaged in interstate commerce, and proved that fact. Therefore, since said Act is the only one under which recovery by a servant of a railroad can be had when doing such work as Haney was doing, and since the only persons who are entitled to the benefit of that Act are servants of railroads, it follows that Haney's representative cannot recover against the Illinois Central Railroad Company unless Haney was the servant of that railroad company

at the time of his fatal injury, and the evidence just reviewed shows that he did not bear that relationship to the Illinois Central Railroad Company. Therefore, there can be no recovery by his personal representative in this case against the Illinois Central Railroad Company.

The outstanding distinction between facts in the cases relied on by petitioner as justifying the granting of a writ of certiorari and the facts in this case is that in those cases **there was no question at all but that the operation of a train injured or killed the servant in question.** At least, there was ample evidence in every one of such cases clearly justifying submission to the jury of the issue of injury or death resulting from the operation of a train; while in the case at bar the evidence clearly shows that the decedent was not killed by the operation of the train and there was no substantial evidence from which a jury could properly have found that he was so killed, rather than by a cause for which this respondent was in no wise liable.

CONCLUSION.

While the Supreme Court of Missouri assigned but one reason for holding that the plaintiff failed to make out a case entitling him to have it submitted to the jury, there were various other reasons above discussed on account of which, we respectfully submit, this court could properly hold that the Supreme Court of Missouri did right in reversing the judgment outright on account of failure of plaintiff to produce sufficient substantial evidence to warrant submission of the case to the jury.

We briefly summarize here our reasons for the above statement:

(a) As held by the Missouri Supreme Court the verdict rests purely upon speculation and guesswork as to what cause produced the death of Haney.

(b) Even if the accident happened as claimed by plaintiff, such accident was so unusual that it could not reasonably be foreseen by a reasonably prudent person exercising ordinary care.

(c) Even if it was negligence on the part of the Frisco Railroad Trustees to operate its train so that a mail catcher arm might swing out one foot, this defendant could not be liable, because there was no evidence tending to show that it had notice of such condition. (Parenthetically we may add that if the mail catcher arm swung out one foot and struck Haney, there is no fact from which it could be reasonably inferred that it did so because of negligence on the part of the Frisco Trustees.)

(d) Plaintiff's evidence wholly failed to reveal that the accident happened on Illinois Central property or on property over which it had any right to exercise control, and therefore, it could not be liable for failure to furnish light at said place or to remove the cinders and gravel north of the Frisco track.

The undisputed evidence showed that the point of accident was on a public street in the City of Memphis.

(e) No causal connection was shown between the presence of the pile of cinders and gravel and the happening of the accident. There was no evidence offered to show that this respondent required Haney to stand on said pile of gravel and cinders or that he could not have stood north or south of the same.

(f) The undisputed evidence—documentary evidence—offered by the plaintiff showed that Haney was an employee of the Yazoo & Mississippi Valley Railroad Company, not of the Illinois Central Railroad Co., and this was corroborated by undisputed evidence offered by this respondent.

(g) Frisco train No. 106 was not operated by the respondent.

It is therefore respectfully urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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FILE COPY

1946

**IN THE
SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1945.

**WALTER A. LAVENDER, Administrator
de bonis non of the Estate of L. E.
Haney, Deceased,**

Petitioner,

vs.

**J. M. KURN et al., Trustees of St.
Louis-San Francisco Railway Com-
pany, Debtor, and ILLINOIS CEN-
TRAL RAILROAD COMPANY,
Respondents.**

No. 550.

SEPARATE BRIEF

**Of Respondents, J. M. Kurn et al., Trustees of
St. Louis-San Francisco Railway
Company, Debtor.**

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No. 550.

SEPARATE BRIEF

Of Respondents, J. M. Kurn et al., Trustees of
St. Louis-San Francisco Railway
Company, Debtor.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri is reported in 189 S. W. (2d) 253 and appears in the Record at pages 281-291. For convenient reference said opinion is set out in the Appendix to this brief.

STATEMENT OF THE CASE.

These respondents, J. M. Kurn, et al., Trustees of St. Louis-San Francisco Railway Company, Debtor, will be referred to in this brief as "Trustee respondents."

The gist of this case and the issues presented to the Supreme Court of Missouri are clearly and concisely set out by that Court at the beginning of its opinion, as follows:

"Action under the Federal Employers' Liability Act, 45 U. S. C. A., § 51 et seq., to recover damages for the death of L. E. Haney. Verdict and judgment for \$30,000 went for plaintiff and defendants appealed.

"Haney was a switch tender in the railroad yards of Memphis, Tennessee, and was killed, while on duty, December 21, 1939, about 7:30 p. m. by being struck in the back of the head by some object. If deceased was an employee of defendants, then it is conceded the cause is properly under the Federal Employers' Liability Act.

"Error is assigned (1) on the refusal of a demurrer to the evidence; (2) on the admission of evidence; (3) on giving plaintiff's instruction No. 2 and refusing defendant trustees' instruction C; and (4) on the alleged excessive verdict. One phase of the alleged incompetent evidence is of importance in connection with the demurrer as we shall see.

"It was plaintiff's theory that Haney was the employee of the trustee defendants **and** the Illinois Central, and that his death was caused by being struck by a mail hook or mail catcher arm, hereinafter for the most part, referred to as the mail hook, swinging out from the side of a Frisco mail car. Defendants contend that there was no substantial competent evidence to support such theory, and it is contended that Haney was not the employee of the Frisco trustees or

of the Illinois Central, but was the employee of the Yazoo & Mississippi Valley Railroad Company. The demurrer raises two questions: Was there substantial competent evidence that Haney was struck by the mail hook? And, was there substantial evidence that Haney was the employee of defendants?" (R. 281, Appendix 11-12, 189 S. W. [2d] 253.)

It will be noted that the demurrer raised two questions: "Was there substantial competent evidence that Haney was struck by the mail hook? And, was there substantial evidence that Haney was the employee of defendants?" The Court below took up the first of these two questions, carefully reviewed and considered the evidence relating thereto, and answered the question in the negative. Since this holding necessitated reversal of petitioner's judgment the Court said: "It will not be necessary to rule other questions." (R. 281, 291, Appendix 12, 24 25) 189 S. W. [2d] 253, l. c. 254, 259.)

The sole issue for determination of the Court in this proceeding is whether or not the Supreme Court of Missouri's holding that it would be mere speculation and conjecture to say that Haney was struck by the mail hook is in harmony with the applicable decisions of this Court.

The statement of the case in petitioner's brief evades the real issue and is burdened with much comment as to issues extraneous here, such as Haney's alleged employment status, the instructions given by the trial court, and the numerous motions filed by petitioner in the Supreme Court of Missouri.

The opinion of the Court below contains an accurate and impartial statement of the facts bearing on the decisive issue there and here as to whether or not the evidence was sufficient to show that Haney was struck by the mail hook. While we do not agree with the statement of the Court below that "It could be inferred from the facts

that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches" (R. 285, Appendix 16-17, 189 S. W. [2d] 253, l. c. 255), it is apparent that this does not purport to be a statement of the evidence, but merely a statement of a conclusion or inference which that Court felt could be properly drawn from the evidence.

Trustee respondents accept and adopt the factual statement of the Supreme Court of Missouri in the opinion below as and for their statement of the evidence. In order that the Court may have a clear understanding of the physical conditions at the scene of the accident it is suggested that while reading the opinion of the Court below, the Court have before it the photographs of the location in question taken the morning following the accident in the presence and under the direction of Mr. Gleason and Mr. Owens, members of the Homicide Squad of the Memphis Police. (Trustees' Exhibits A and B, R. 102A, 102B, offered in evidence R. 101, described R. 93, 94, 95, 98, 99, 100, 103.)

SUMMARY OF ARGUMENT.

1.

The sole issue decided by the Supreme Court of Missouri and to be decided here is whether or not there was substantial evidence that Haney was struck by the mail hook. The decision of the Supreme Court of Missouri that it would be mere speculation and conjecture to say that Haney was struck by the mail hook is in harmony with the applicable decisions of this Court.

Brady v. Southern Ry. Co., 320 U. S. 476;
Chicago, M. & St. P. Ry. v. Coogan, 271 U. S. 472;
Kansas City Southern Ry. v. Jones, 276 U. S. 303;
New Y. C. R. Co. v. Ambrose, 280 U. S. 486, 490;
Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351;
Atchison etc. Ry. v. Saxon, 284 U. S. 458;
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333.

2.

In passing upon this issue the Court below gave consideration to the competency of the hearsay testimony of the witness Drashman concerning statements which he said he heard made by an unknown person who "didn't see the accident" (R. 40, 52, 62, 232), and held such testimony incompetent and improperly admitted by the trial court. Such holding of the Court below was in accordance with its own prior decisions and in accordance with the applicable principles of the law of evidence.

Barker v. St. Louis, I. M. & S. Ry. Co., 126 Mo. 143,
28 S. W. 866;
Redmon v. Metropolitan St. Ry. Co., 185 Mo. 1, 84
S. W. 26;
Ruschenberg v. Southern Electric R. Co., 161 Mo.
70, 61 S. W. 626;

Sconce v. Jones, 343 Mo. 362, 369, 121 S. W. (2d) 777, 781;

Vicksburg & Meridian Railr'd v. O'Brien, 119 U. S. 99;

Wigmore on Evidence, 3rd Ed., Sec. 1751;

4 Chamberlayne on Evidence, 2893.

3.

In any event, the admissibility of evidence in a suit under the Federal Employers' Liability Act is a matter pertaining to the remedy and is governed by the law of the forum.

Central Vermont Ry. v. White, 238 U. S. 507, 511, 515, 516, Ann. Cas. 1916 B 252;

Chesapeake & Ohio Ry. v. Kelly, 241 U. S. 485, 491;

Joice v. Missouri-Kansas-Texas R. Co. (Mo.), 189 S. W. (2d) 568, 575;

Restatement of the Law, Conflict of Laws, Sec. 597.

ARGUMENT.

This suit is brought under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51 et seq., which specifically limits any recovery thereunder to cases of injury or death of an employe resulting in whole or in part from the **negligence** of the employing carrier. The sole charge of negligence against Trustee respondents was that they "negligently caused, suffered and permitted a rod, stick or some other object to project out or swing out from the side of said Frisco passenger train and to strike said Lyman Elmer Haney" (R. 4).

It will be observed that there is no charge of a defective mail hook or that the mail hook was improperly installed or maintained. Petitioner's own evidence developed that there was no rod, stick or other object projecting out or swinging out from the side of the train (R. 57, 62, 64). No witness claimed to have seen any such object, and an inspection of the train after its arrival in the Memphis station revealed that there was no rod or other object protruding from the side of the train (R. 104-105). Having completely failed to sustain his charge that Haney was struck by a rod or other object protruding from the side of the train, petitioner had only one possible theory left, to wit, that Haney was struck by the mail hook. Nowhere in the record or in petitioner's brief will there be found any contention that the charge of negligence in question has been sustained in any other respect or on any other theory.

In arguing that his theory of the case was supported by sufficient evidence to take it out of the realm of speculation and conjecture petitioner lays great stress upon the hearsay testimony of the witness Drashman, and contends that such testimony was admissible and competent under the res gestae rule. The trial court permitted petitioner's

witness, Drashman, to testify that an unknown person, thought to be an Illinois Central witchman (R. 50, 59), who didn't see the accident (R. 40, 52, 62, 232), said that he "thought that train 106 backing into Grand Central station is what struck this man" (R. 52, 232), and that he "thought something sticking out on the train hit him" (R. 54, 233). The Supreme Court of Missouri held that this evidence was incompetent and was improperly admitted by the trial court (R. 290, 291, 189 S. W. [2d] 253, 258, Appendix 22-24). This holding of the Court below was in accordance with its own prior decisions and in accordance with the applicable principles of the law of evidence (Authorities cited under Summary of Argument, 2).

In any event, the admissibility of evidence in a suit under the Federal Employers' Liability Act is a matter of procedure or remedy which is governed by the law of the forum, and petitioner has no proper grounds for seeking a ruling on such question from this Court in this proceeding (Authorities cited under Summary of Argument, 3).

Even though it could be found without resorting to speculation and conjecture that the mail hook struck Haney, what would be the actionable negligence of Trustee respondents? The mail car was next to the engine and as this train of twelve cars backed into the station it was the twelfth car to pass Haney (R. 125, 128). The train was backing around a curve at a speed of eight or ten miles an hour (R. 126, 128). There is no charge, and there is not a scintilla of evidence that the mail hook was defective or that the track was defective or that the train was backing at a dangerous or unusual rate of speed.

Under our Summary of Argument, 1, we have cited a number of decisions of this Court in support of our contention that the decision of the Supreme Court of Missouri is in harmony with the applicable decisions of this Court.

The applicable decisions of this Court hold, as did the Court below, that verdicts may not be based upon speculation and conjecture. We shall quote briefly from one of these cases because the language of the Court is so appropriate here.

In the case of *Chicago, M. & St. P. Ry. v. Coogan*, 271 U. S. 472, at page 477 of the opinion, the Court said:

“Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed.”

At page 478 of the opinion in the *Coogan* case, *supra*, the Court, in speaking of the sufficiency of the evidence as to the negligence charged, said:

“The record leaves the matter in the realm of speculation and conjecture. That is not enough.”

CONCLUSION.

It is respectfully submitted that the decision of the Supreme Court of Missouri is in harmony with the applicable decisions of this Court and should be affirmed.

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Francisco Railway Company,
Debtor.

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Of Counsel.

APPENDIX.

We set out herewith, for the convenience of the Court, the opinion of the Court below which is reported in 189 S. W. (2d) 253, and which appears in the Record at pages 281-289.

In the Supreme Court of Missouri,
Division Number One,
May Term, 1945.

Walter A. Lavender, Administrator
de bonis non of the Estate of L. E.
Haney, deceased,

Respondent,

vs.

J. M. Kurn et al., Trustees of St. Louis-
San Francisco Railway Company,
Debtor, and Illinois Central Railway
Company,

Appellants.

No. 39,174 *

Action under the Federal Employers' Liability Act, 45 USCA, Secs. 51 et seq., to recover damages for the death of L. E. Haney. Verdict and judgment for \$30,000 went for plaintiff and defendants appealed.

Haney was a switch tender in the railroad yards of Memphis, Tennessee, and was killed, while on duty, December 21, 1939, about 7:30 p. m. by being struck in the back of the head by some object. If deceased was an employee of defendants, then it is conceded the cause is properly under the Federal Employers' Liability Act.

Error is assigned (1) on the refusal of a demurrer to the evidence; (2) on the admission of evidence; (3) on giving plaintiff's instruction No. 2 and refusing defendant trustees' instruction C; and (4) on an alleged excessive

verdict. One phase of the alleged incompetent evidence is of importance in connection with the demurrer as we shall see.

It was plaintiff's theory that Haney was the employee of the trustee defendants **and** the Illinois Central, and that his death was caused by being struck by a mail hook or mail catcher arm, hereinafter for the most part, referred to as the mail hook, swinging out from the side of a Frisco mail car. Defendants contend that there was no substantial competent evidence to support such theory, and it is contended that Haney was not the employee of the Frisco trustees **or** of the Illinois Central, but was the employee of the Yazoo & Mississippi Valley Railroad Company. The demurrer raises two questions: Was there substantial competent evidence that Haney was struck by the mail hook? and, was there substantial evidence that Haney was the employee of defendants?

The Frisco train involved was a passenger train, consisting of 12 cars, made up of 3 baggage cars, 1 mail car which was next to the tender; other cars were Pullmans and chair cars. The train was from Birmingham, Alabama, and its destination was Kansas City, Missouri. The Frisco tracks in the yards extend east and west and the Illinois Central tracks extend north and south. The Frisco train approached from the east, but stopped east of the Illinois Central tracks. Haney's shanty (office) was west of the Illinois Central tracks, and north of the Frisco mainline track, on which the Frisco train approached from the east. The Illinois Central's Grand Central Station was about 2700 feet north of the Frisco mainline track. There was a Frisco switchstand about 200 or 250 feet west of Haney's shanty and on the north side of the mainline Frisco track, by which switch the tracks were so lined that a train could back into the Grand Central Station. In order to reach the Grand Central Station the Frisco

train moved west on its mainline track until the rear passed this switchstand, and then Haney lined the switch so the train could back into the station.

The Frisco train started up from the point where it had stopped east of the Illinois Central tracks, moved west until its rear was 20 or 30 feet west of this switch; Haney, as stated, then lined the switch and the train backed east to the switch and there entered the track which turned north to the station. Rule 104, so defendants claim, required Haney, after he lined this switch, to cross to the south side of the track, and the Frisco conductor, who was standing on the rear of his train, testified that he (Haney) did so cross after he lined the switch, and the last he saw of him "he was standing south of the track." But it was Haney's duty to close the switch when the train cleared, then return to his shanty and give the green light to any train that wanted to cross the Frisco tracks. The Frisco train cleared the switch backing into the station, but the red lights at Haney's shanty remained on. Investigation was made by John Joseph Brusco, yard conductor of the Illinois Central, and Haney was found unconscious on the north side of the track with a wound in the back of his head. An ambulance was called, but he was dead when the ambulance arrived at the hospital.

On the north side of the track at the switch was a mound about 2 feet in height which came up within about 3 feet of the north rail. The overhang of the Frisco mail car was about 2 feet, hence the mound came up or extended south to a point about one foot north of the side of the mail car as it passed the switch. Based on the evidence of plaintiff's witness Farmer, *infra*, the only witness who testified about mail hooks, it could be inferred that there was a knob like iron curl or ring on the end of the mail hook on the side of the mail car which passed over the switch Haney lined, which knob, when the arm is

down and resting against the side of the car, is about 6 feet 8 inches above the top of the rail, which is 7 inches high. The ties were imbedded at the switch so that the tops thereof were about level with the ground. Hence, the knob at rest against the side of the mail car was 6 feet 8 inches above the ground level, or 4 feet 8 inches above the top of the mound. Haney was about 5 feet 8 inches in height, and standing on the mound the top of his head was one foot higher than the knob at rest against the side of the car. The wound was on the back of Haney's head and, it may be inferred, about 4 inches below the top of the head, hence, with Haney standing erect on the mound, the knob was 8 inches below the place of the wound. However, as we understand, the mail hook ascends as it extends out. In stating the evidence of witnesses, we have made some omissions, appearing in the record, but we have omitted the usual signs of omission.

C. Bruce Farmer, a witness for plaintiff and referred to, supra, testified: "I live in Kirkwood, Missouri; am a railway postal clerk; run on the Burlington; have been running on the railroad as a railway mail clerk since 1925; last night I made some measurements of mail pouch hooks on trains; I measured a Frisco car and it was 6 feet 8 inches from the bottom of the catcher arm to the top of the ties. When the (side) door is closed, the catcher arm could swing out a little ways, and when it swung the full distance it was 7 feet 3 inches from the bottom of the catcher arm to the top of the ties. With the door open (and the handle pulled down inside) it would have been 9 feet from the top of the ties. I measured another Frisco car and it (mail hook) was 6 feet 8 inches from the top of the ties. These measurements are from the top of the ties up to the bottom of the iron hanging down. In my experience I have seen the catcher arm swing out (with door closed) as far as a foot. If the door is open (and

handle pulled down) the catcher arm can swing out as far as 2 feet 2 inches, to 3 feet, but they won't swing out unless somebody pulls them up; somebody has to get hold of the handle and pull them up. They won't swing more than 12 inches without that (there was no evidence that the door was open or handle pulled down); it pivots just from the sway of the train. They won't swing any farther with the door open. I have never seen those catcher arms swing out without any force from the mail operator more than one foot from the side of the car, and that would ordinarily be going around a curve or at an excessive speed of the train so that it would rock.

"In coming into the Union Station at St. Louis, nearly all of the trains pull up and back around a curve with the back end going into the station first. I have seen that done hundreds of times. In backing in at a speed of 10 miles an hour or less over a switch, if the track was smooth, would not throw the mail catcher arm out from the bottom of the car at all, but if the track was wavy, it might. It might come out a little distance from the bottom, but ordinarily not as much as a foot from the side of the car. The mail catcher arm itself is about 26½ inches, but the bracket takes up 3½ to 4 inches and the total makes an extreme extension of about 30 inches. The bottom of the catcher arm is round and is about 3 inches in diameter. I mean the knob down at the extreme end. The end of the catcher arm which I have designated as a knob is more correctly designated as a loop. It is round, but is like a ring and curved so it won't run through a pouch."

J. E. Mee, engineer on the Frisco train involved and a witness for defendant, testified: "We went the length of 3 cars and a locomotive beyond that shanty (Haney's shanty) and stopped on a signal from the conductor on the rear of the train. I got a blast of 3 whistles on the air

from the conductor to start backing up. I couldn't see the back end of the train from my position in the cab because of a curve. In starting the backward movement I always looked back at the movement of the train, turned and faced the rear end, in the direction we were going, and watched the movement of the train. That is my duty, to look down to the back and alongside my train as I start backing. We lean out of the window to do that. It is up to the engineer whether he leans out the side or looks through the rear vision window. The first cars I was looking at would be the mail and baggage cars, and I was looking back along the north side of them and as far back as I could see. As we made that backward movement the conductor controlled the air brake on the train from the rear end of the train. We stopped the train on that occasion before we got into the station and, with his signal which I had to get from him before I could move, I started again. I could see nothing of the rear end. It was on the curve and out of sight. After stopping and getting his signal to proceed, I backed on clear into the station. I did not see Haney or any person at that switch as I approached (backing in) and passed it. I didn't see any person lying on the ground or standing up there or anybody at all near the side of my train. I was at all times looking out of my window toward the rear and past the side of the mail and baggage cars at the head of the train. I was backing around the curve to the left and north and upgrade. We were going approximately 8 miles an hour before I got the signal to stop. I suppose we backed up about 300 feet or something like that when I was stopped. After that I got another signal to back up and I backed up and continued backing on into the station."

It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook

extended out as far as 12 or 14 inches. But in this connection there are two questions: Was there substantial evidence that the mail hook extended out to any extent as the mail car was backed by the mound and over the switch? and, Was there any substantial evidence that Haney, when struck, was standing at a point or place on the mound where he could have been struck by the mail hook extended as the mail car passed the switch and mound?

Both sides of the Frisco train were examined before it left the station and nothing was found extending out from the sides. As appears, supra, Brusco, yard conductor for the Illinois Central, made an investigation when the red light did not change at Haney's shanty. Brusco was the first, so far as appears, to see Haney after he was injured, and as a witness for defendants, testified that Haney was lying on his stomach, body extending north and south, and was 14 feet west of the switch; that the right side of his face was down and his head 5 feet 9 inches (determined by actual measurement) north of the north rail of the Frisco track with the feet extending back north; that there was a small pool of blood right at his mouth; that "there was a small space where his toes had dug (south) as the weight of his body, where he fell forward. I imagine those marks were 12 or 13 feet north of the north rail of the Frisco track. They appeared to be about the length of his body back from his head as though slipped forward. I was the first one to him. There was nobody else around there that I could see anywhere at that time." There was a telephone pole "immediately north of where dragging of his feet was."

Brusco, after seeing the situation, went back east "just the other side of Haney's shanty," and called Bundy and Arnold, Illinois Central switchmen, and told them Haney was hurt, and Bundy went back to Haney with Brusco; no

one was there when they arrived. Brusco further testified: "We raised up Mr. Haney's body and turned him over. When we raised him up his left hand was at his chest with his lantern in it. His right hand was on the lower part of his stomach with his pistol in his hand loose. His hand was open and his pistol in it. We turned him around to the northwest so that his head would be at the side of the mound."

As a witness for plaintiff Bundy testified: "When we (Bundy and Brusco) got to the switch we found Mr. Haney lying on the ground, face down. He was north of the switch and a little to the west of it, probably 2 or 3 feet west. His head was pointed south, kind of an angle. The Frisco track runs east and west at the point. Haney's head was pointed a little south and east and his feet extended northward, kind of an angle. I would say Haney's head was about 6 feet from the switch, that is north of it, and a little to the west. * * * I saw a pistol lying under Haney's body. I think Haney was about 5 feet 10 inches in height. I would say his feet were about 10 feet north of the north rail of the Frisco track and extended straight back of him, not doubled under him. We turned him over. Before we turned him over I saw right on the back of his head a gash about 2 inches long. It was bleeding. I saw no other injury. Mr. Brusco and I were the only ones present when we turned him over. Before we turned him over I did not see his lantern or pistol. After I turned him over I saw that the pistol and lantern were under his body. When we turned him over the pistol came into view. It indicated it might have slipped out of his pocket, and probably did. His clothing showed nothing to indicate a struggle. The Frisco train had just backed east and turned north into the station. After that Frisco train backed in, to the best of my knowledge, I would say it was 10 minutes before we went up there and found Mr. Haney's

body. During that 10 minutes I had been waiting for a signal that Mr. Haney operates over in his shanty.

"The first man who came up after us to the scene was Mr. Cowan (I. C. switchman—not a witness). The two of us (Bruso and Bundy) didn't remain there very long, not over 5 minutes, if I remember right. Bruso then went and called an ambulance. We turned Haney around and I raised him up and put his head in my lap, squatted down and put his head in my lap. He was alive, but not able to talk. His face was bruised from hitting the ground. I believe the bruise was on the left side of his cheek bone and there were cinders on his face. It appears that the injury to his face was caused by hitting the cinders with his face in falling. I don't think it was more than 10 or 12 minutes after the ambulance was called until it got there. In turning Haney over we turned him toward the east and turned around to the north and east, turned his head more to the north."

Alvin Haney, son of deceased, was at the Frisco switch shortly after his father was removed in the ambulance, and also went to the switch next morning. When there shortly after his father was removed, it was too dark to see well. He testified as to what he observed next morning: "From what they showed me I will say there was a spot of blood from 6 to 8 inches across. It was east of the switch and north of the Frisco tracks. I would say it was between 3 and 4 feet north of the north rail of the Frisco track and around 6 or 8 feet east of that switch."

E. L. Gates, dispatcher for the Arkansas & Memphis Railway Bridge Terminal Company, was a witness for plaintiff. He said that when he arrived Haney was on top of the mound, north of the switch, and 12 or 15 feet "due north from the north rail of the Frisco track, lying on his back with his feet toward the track, his feet nearest the track. Someone, I don't know who, was holding

his head up. That mound north of the tracks near the switch was, I would say, about two feet high, that is, above the rail of the Frisco tracks. I would say it was possibly ten or twelve feet from the mound to the north rail of the Frisco tracks. It was just loose dirt that had been thrown out there until it was built up to the height of possibly two feet, and I would say that the base of it came probably within ten feet of the north rail. That was down at the level of the ground, and then it slopes back a little to the peak of the mound. I know nothing more about the case other than that Haney was wearing a white cap and it was new or practically new, had not become soiled; and I looked at the cap and at a point on the back of it there was a dirty spot on the outside of the cap. There were no blood stains, but just a black spot, and I was told later that that corresponded with the location of the injury on the back of his head, a little to the right of the center of the head, and a little lower than the crown of the head. Possibly just a little above the top of the ear. The mark on the cap was about the width of my finger and possibly an inch and a half long. It seemed like it just angled down, not across."

Dr. W. E. Turner, Jr., witness for plaintiff, testified that at the hospital he assisted in the autopsy on the body of Haney on the night he was killed and "our conclusion was that the skull was fractured by some fast moving small round object. I guess it would be possible for that small round fast moving object to be a rod or something projecting out from a train that was going 8 or 10 miles an hour. I don't know anything about it, but I think it could be. Maybe an iron pipe."

John Joseph Drashman, Frisco coach foreman, was plaintiff's witness. Plaintiff took his deposition and when plaintiff offered the deposition at the trial, objection was made because the witness was present. Drashman testi-

fied at the trial that he went to the place of Haney's injury with the Frisco superintendent of terminals, but that Haney had been removed when he arrived. In his deposition he said he went before Haney was removed and testified as to where Haney was lying and about the wound, etc. In the deposition and at the trial he testified he examined the fireman's side of the train more carefully than the engineer's side and did so because he was told by an Illinois Central switchman that Haney "was supposed to have been struck by something protruding on the side of the train." In the deposition he said that this was told to him at the place of injury and while "Haney's body was lying on the ground."

It appears in the record that the area immediately about the switch was not very well lighted, was dark, and that at night, in this area, many hoboies and tramps, white and colored, "hop freight trains and get rides out of there." Such situation was likely the reason for Haney having a pistol. The police homicide squad made an investigation of Haney's death and the measurement referred to, supra, in the evidence of Brusio, was made by the police in Brusio's presence. Six days after Haney was killed his billfold was found on a high board fence railing about a block from the place where Haney was killed. It contained no money, but contained Haney's social security card and other things. The billfold was not soiled; "it did not appear to have been lying out in the rain or snow." It was found near the place where Haney was placed in the ambulance. Haney had a gold watch and a diamond ring. These were "still on him at the hospital. He never carried much money, not very much more than \$10."

Plaintiff contends that the evidence of Drashman as to what was told to him by an Illinois Central switchman was competent under the rule of *res gestae*, and that under all the evidence plaintiff made a submissible case on the

question as to whether Haney was struck by the mail hook. There was no evidence, expert or otherwise, that the condition of the track and the speed of the backup movement, and whatever curve there was, all considered together, might have caused the mail hook to swing out the 12 or 14 inches necessary to strike Haney, assuming, of course, he was standing on the mound and at a place where such swing out would reach him. Can such extension of the mail hook be reasonably inferred from the evidence of Farmer and all the other facts and circumstances? Would such an inference be based on speculation and conjecture? Also, there is the question, assuming that the mail hook so extended out, Was there substantial evidence that it was the mail hook that struck Haney? It would seem reasonable that if Haney was struck by the mail hook he would have fallen at least somewhat parallel to the track, but the evidence of those first to him is that when Haney was found he was some 6 feet north of the north rail and lying at right angles to the track with his head toward the track and his feet extending back north. And there was evidence that his toes had dragged forward (south) some few inches in falling, as if the blow had come from the north when he was facing south. Alvin Haney, however, said that the blood was between 3 or 4 feet north of the north rail.

As indicated, *supra*, the competence of the evidence of witness Drashman as to what the unnamed Illinois Central switchman told him about it being supposed that Haney was struck by something protruding on the side of the train is of importance in connection with the demurrer to the evidence. As stated, plaintiff contends this evidence is competent under the rule of *res gestae*. Many cases are cited on the **time** element in *res gestae*, but for such element we will assume without deciding, that the evidence as to lapse of time is sufficient under the rule of *res gestae*.

It is not claimed that the unnamed switchman who made the statement to Drashman was speaking from his own knowledge, but from what he had heard. In other words, the **statement itself** claimed to be competent under the res gestae rule was based on **hearsay**. Can such, under any circumstances, be competent under the rule of res gestae? We do not think so.

In the brief counsel say: "Statements of strangers ordinarily classed as hearsay will be admitted as res gestae if they are made as a part of the transaction and so closely connected therewith that the witness has no time to reflect or to make up a story that is not true." In support of such contention many Missouri cases are cited. Among these are *Roach v. Kansas City Public Service Company* (Mo. Sup.), 141 S. W. (2d) 800; *Pryor v. Payne*, 304 Mo. 560, 263 S. W. 982; *Brinkley v. United Biscuit Co. et al.*, 349 Mo. 1227, 164 S. W. (2d) 325; *Sconce v. Jones*, 343 Mo. 362, 121 S. W. (2d) 777. We have examined all the cases cited by plaintiff and find that in each case the statement held competent under the res gestae rule was made by one having first hand information. We find no case where it has even been contended that a statement based on hearsay, as in the present case, may be competent under the rule of res gestae. It is true that the res gestae rule of evidence is an exception to the hearsay rule, but this does not mean that what we may term the res gestae evidence may be based on hearsay. This is quite clearly indicated in the *Sconce* case, *supra*, in which, and in dealing with the res gestae rule, it is said, [121 S. W. (2d), l. c. 781]:

"The principal reason for excluding testimony as to statements made by others out of court is that the test of cross-examination, of the person making them at the time they are made, is unavailable as a safeguard against falsification or inaccuracy. This is the basis of the hearsay rule. The statements, herein involved, must come in, if at

all, under the classification of the exception (*res gestae*) of the hearsay rule, which under certain circumstances permits testimony as to **statements, made by a person involved in or present at an accident** (emphasis ours), declaring the circumstances of an injury at or after its occurrence."

We think it quite clear and therefore rule that the statement of the switchman that Haney was supposed to have been struck by something protruding on the side of the train was not competent under the *res gestae* rule.

A court should never withdraw a question from the jury unless all reasonable men in the honest exercise of a fair and impartial judgment would draw the same conclusion from the facts which condition the issue. *Courtney v. Ocean Accident & Guaranty Corporation*, 346 Mo. 703, 142 S. W. (2d) 858; but it is well settled that verdicts may not be based on conjecture and speculation. *Hamilton v. St. Louis-San Francisco Ry. Co.*, 318 Mo. 123, 300 S. W. 787; *Mullen v. Lowden et al.*, 344 Mo. 40, 124 S. W. (2d) 1152; *Lappin v. Prebe et al.*, 345 Mo. 68, 131 S. W. (2d) 511; *Federal Cold Storage Co. v. Pupillo*, 346 Mo. 136, 139 S. W. (2d) 996, l. c. 1001, and cases there cited. Also, it is well settled that a mere possibility of negligence is not a sufficient foundation for an inference of negligence which will justify submission of a case to a jury. *Mullen v. Lowden et al.*, *supra* [124 S. W. (2d), l. c. 1156].

With the hearsay eliminated, we think that all reasonable minds would agree that it would be mere speculation and conjecture to say that Haney was struck by the mail hook, and we are constrained to rule that plaintiff failed to make a submissible case on that question. And we also rule that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney. It will not be neces-

sary to rule other questions. The judgment should be reversed, and it is so ordered.

John H. Bradley,
Commissioner.

Dalton, C., concurs.

Van Osdol, C., concurs.

Per Curiam: The foregoing opinion by Bradley, C., is adopted as the opinion of the Court. All the Judges concur.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator
de bonis non of the Estate of L. E.
Haney, Deceased,

Petitioner,

vs.

J. M. KURN et al., Trustees of ST.
LOUIS-SAN FRANCISCO RAILWAY
COMPANY, Debtor, and ILLINOIS
CENTRAL RAILROAD COMPANY,

Respondents.

No. 550.

On Writ of Certiorari to the Supreme Court of Missouri.

SEPARATE BRIEF
Of Illinois Central Railroad Company
(a Respondent Herein).

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator
de bonis non of the Estate of L. E.
Haney, Deceased,

Petitioner,

vs.

J. M. KURN et al., Trustees of ST.
LOUIS-SAN FRANCISCO RAILWAY
COMPANY, Debtor, and ILLINOIS
CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.

On Writ of Certiorari to the Supreme Court of Missouri.

SEPARATE BRIEF

Of Illinois Central Railroad Company
(a Respondent Herein).

**STATEMENT AS TO NATURE OF THIS
PROCEEDING.**

The statement on pages 1 and 2 of petitioner's new brief filed herein after the granting of the writ by this court is admitted to be correct.

THE OPINION OF THE COURT BELOW.

The statement on page 2 of petitioner's new brief herein giving citation of the opinion of the Supreme Court of Missouri is correct.

JURISDICTION OF THIS COURT.

This court has jurisdiction to hear and determine this proceeding on the grounds alleged in said brief of petitioner on pages 2 and 3 thereof.

STATEMENT OF THE CASE.

While the history of the litigation—that is, as to the various proceedings, filing of pleadings, trial of case, appeal to Supreme Court of Missouri, decision by that Court, filing and overruling of motion for rehearing—is correctly set forth in the petition filed in this Court, this respondent is by no means satisfied with the statement of facts set forth in petitioner's petition for writ of certiorari or that found in his brief. On the contrary, as this respondent will show to the Court, there are glaring errors in said statements of facts, and for that reason the statements are exceedingly unfair, so that it is deemed necessary to make a full statement of the evidence.

The Evidence.

Haney's employment was that of a switch tender. It was a part of his duty to regulate certain overhead signal lights which were controlled from the shanty in which he had his office, and which governed the movements of certain trains.

On the evening in question, shortly before 7:30 o'clock, Haney set the lights from his shanty so that they would show red and stop north and south bound traffic in the Illinois Central terminal yards and would permit a Frisco interstate train from Birmingham, Ala., to Memphis, Tenn., to cross over the northbound and southbound Illinois Central tracks in the terminal yards, and then proceed westwardly until it passed a certain long switch. Haney then threw that switch (the switchstand where he threw the switch being entirely outside of the terminal yards), so that the Frisco passenger train could back over it eastwardly into the terminal yards and then northwardly into the Grand Central Station. It was Haney's duty to remain near the switchstand until the entire train passed completely over the switch point and passed the switchstand,

and then throw the switch back again and see to it that the light on the switchstand (which was then red) changed from red to green. While waiting for that train to pass, Haney's proper place was on the south side of the track. His next duty was to go back to his shanty, about 300 feet east, and change the overhead lights so that they would show green for northbound and southbound traffic in the yards (Rec. p. 93).

After the Frisco train backed eastwardly over the switch into the terminal yards all of the lights above referred to, including the one on the switchstand, remained red. Therefore, Brusco, foreman of one of the Illinois Central switching crews, whose engine had been stopped by the overhead red lights, went to the switchstand to investigate and found Haney lying, unconscious, north of the Frisco track and 14 feet farther west than the switchstand. No evidence shows just when he fell there. Brusco returned to the yard, sent a man to call for an ambulance, and took another switchman (Bundy) back with him to where Haney was lying unconscious (Rec. pp. 26-94). It was found that Haney had been struck on the back of the head apparently by some blunt instrument which crushed his skull at that point. He never regained consciousness, and was dead when the ambulance carrying him arrived at the hospital to which he was sent (Rec. pp. 65-254).

One of plaintiff's witnesses (Gates) testified (Rec. p. 24) that many transients, both black and white, were around the railroad yards in the neighborhood of the scene of the accident in question, both in the daytime and in the nighttime, seeking chances to steal rides on trains.

The switch track ran east and west near the place where Haney was found unconscious, and some feet south of his head. When Brusco and Bundy arrived, Haney was lying on the ground, face down; was a little farther north than the switchstand and a little west of it, his head pointed at a kind of angle **toward the south**, and his feet extended

northward at kind of an angle. **His head was about six feet north** (Rec. p. 26) of the switchstand and a little to the west of it. **Haney was 5 feet 7½ inches in height and his feet were about 10 feet north of the north rail of the switch track, extending straight back of him and not doubled under him,** so plaintiff's witness Bundy said (Rec. p. 27). There was a gash on the back of his head about two inches long, which was bleeding. **Bruso and Bundy turned Haney over** and then discovered his pistol loosely in his hand and his lantern under him. The switch had not been closed after the Frisco train had backed over it and gone to the station, and the red light on the switchstand was still showing (Rec. p. 27).

Bruso and Bundy turned Haney around and raised his head, and Bundy squatted down, took Haney's head on his lap and held it until the ambulance driver came to take him to the hospital (Rec. p. 28). There was no evidence of any injury other than the one to the back of Haney's head, except scratches on the right side of Haney's face where it had struck the cinders (Rec. pp. 93, 67, 254). His watch and his diamond ring were found on him, **but his pocketbook with his money in it was missing.** The pocketbook was found a week later about two blocks from the scene of the accident at a point where it had been sheltered from the weather (Rec. p. 118). It was identified by papers in it bearing Haney's name. Haney's money had been taken from it.

Plaintiff had, long before the trial, taken the deposition of John Joseph Drashman, who was coach foreman for the Frisco Railroad, having charge of supervising repairs and anything connected with passenger cars. Drashman, being present at the trial, was called by plaintiff as a witness. He testified that he was on duty on the evening of December 21, 1939, at the Grand Central Station, a little more than half a mile north and east of the scene of the accident. Having been informed about 7:40 P. M. that an

accident had occurred down near the switch in question, Drashman went with the superintendent of the Frisco Terminals, Mr. Ora L. Young, on foot down to the place where Haney had been found unconscious.

Drashman became very much confused at the trial as to what he had testified to in his deposition. In his deposition he had testified that he made two trips to the scene of the accident, and that on the first trip he found Haney still on the ground, unconscious; that he returned to the station, made an inspection of both sides of the train, found nothing swinging out from it or extending out from it (Rec. pp. 62-64), and then came back, and by that time Haney had been sent to the hospital. At the trial Drashman positively denied that he made more than one trip to the scene of the accident and said that Haney had been removed before he got there, and, therefore, he did not see Haney at all, but he gave the same testimony as to inspection of the train as he had given in his deposition. All that was said by either Drashman or Gates in their depositions as to the position of Haney when they arrived throws no light on the position in which he was first found, because, as above stated, Brusio and Bundy turned him over and turned him around before anybody but them arrived, as both Brusio and Bundy testified.

Both in his deposition and at the trial Drashman was permitted to testify, over strenuous objections by all of the defendants, through their counsel, that while he was investigating at the scene of the accident, some unknown person, whom he took to be an I. C. railroad switchman, stated in his hearing in a group of men who had gathered there that he **thought** that something sticking out from the side of the train had struck Haney and injured him. Both in his deposition and at the trial Drashman said that he did not know who that man who made the statement was, but that said man did not claim to have been present or to have seen the accident happen (Rec. p. 62).

These statements of Drashman, as to what was said by an unknown man at the scene of accident, were objected to as hearsay, but were admitted by the court on the theory that they constituted a part of the *res gestae*.

The baggage cars and the mail car had sliding doors which are on the inside about six inches from the outside of the cars, and the Pullmans and day coaches all had vestibule doors which opened toward the inside of the cars. There were, of course, no freight cars in that high class passenger train (Drashman's testimony, Rec. p. 58).

There was a railroad track used by two other railroads than the Frisco, about 25 feet north of the Frisco switch. About midway between those two tracks was an accumulation of cinders and dirt about 18 inches to two feet in height and running a considerable distance east and west, which resulted from the accumulation of sweepings from the two tracks. Defendants' Exhibit B (Rec. p. 102B) clearly shows that this higher ground was farther from the rail than the first white pencil which was 5 feet 9 inches from the rail (Rec. p. 110).

The hospital record of St. Joseph's Hospital in Memphis was offered in evidence and showed that Haney was dead when he arrived at the hospital. In the history of the case contained in the hospital record it was stated that there was an abrasion to the right posterior part of the head approximately five centimeters long and one centimeter wide with depression of the skull under the abrasion involving occipital and parietal regions, and that cinders were ground into the skin **on the right side of the face** (Rec. p. 67).

The report of the autopsy showed no injuries other than those above mentioned (Rec. p. 67). It was recited that there was a traumatic fracture of the skull with associated meningeal hemorrhage.

The physician who examined Haney to ascertain whether

he was dead or alive when he arrived at the hospital (Dr. W. E. Turner, Jr.), testified for plaintiff that he was the one who had made the record and he was present when the autopsy was performed. He testified: "Our conclusion was that the skull was fractured by some fast moving small, round object. I guess it would be possible for that small round, fast moving object to have been a rod or something projecting out from a train that was going 8 or 10 miles an hour. I don't know anything about it, but I think it could be. Maybe an iron pipe." He said in cross-examination: "It is very possible, in my opinion and judgment, that this man could have suffered a blow by some, maybe, gas pipe or club or other similar round object also in the hands of some individual" (Rec. p. 66).

C. Bruce Farmer, a railway postal clerk who had been employed by the United States Government on railway postal cars for many years, was called by plaintiff as an expert witness to show the structure of mail catcher arms on the sides of mail cars (Rec. pp. 82-87).

He testified that such cars vary from 30 to 60 or 70 feet in length. He identified Defendants' Exhibits C and D (Rec., pp. 102C-102D) as correct photographs showing such a mail catcher arm, Exhibit C showing it down at the side of the car while not in use, and Exhibit D showing it when raised in such position that it can catch a mail pouch above a station platform. He testified that he had measured several such mail cars and the space between the level of the ties of a track on which the cars stood and the bottom of the mail catcher arm when not in use. He found that on the Frisco mail car which he measured the distance was 80 inches from the level of the ties to the lower end of the mail catcher arm when down, and when the same arm was swung out into position to catch a mail pouch, it was 87 inches from the top of the ties to the mail catcher arm (Rec. p. 83).

In all his experience he had never known such a mail catcher arm, when hanging out from the side of the car, to swing out more than one foot from the side of the car (Rec. p. 83), and it did that only in the event that the train was being very rapidly run or was going around a curve. When the door was open, and only when it was open, a mail clerk inside the car could catch hold of the lever above the cross-piece of the catcher arm and pull it inward and downward and cause the mail catcher arm to swing up into position to catch a mail pouch, and it would then be about 9 feet above the top of ties, and extend out about 30 inches from the side of the car (Rec. p. 83).

Haney's son testified that on the morning following the accident he saw a spot of blood (at least he took it to be blood) on the cinders about six or eight feet east of the switch stand in question and three or four feet north of the rail and that the ground north of that point for some distance east and west was rough and uneven (Rec. p. 80).

Evidence as to Employer of Haney.

In an effort to prove that Haney was an employee of the Illinois Central Railroad Company, plaintiff's counsel, while the widow of Haney was on the witness stand, offered in evidence the pay checks for Haney's wages, which checks were twelve in number, covering periods of two weeks each from July 15, 1939, through the second period of December, 1939, the last check being dated December 30, 1939 (Rec. p. 75).

All of those checks were payable to L. E. Haney, and all but the two for two periods in December, 1939, bore Haney's endorsement, which was identified by the widow, who testified that he got the money represented by all of those checks except the one dated December 15, 1939, and the one dated December 30, 1939, which last two mentioned checks were paid to her after Haney's death, by a special

arrangement which she made with the Yazoo and Mississippi Valley Railroad, whereby she was permitted to endorse and collect them (Rec. p. 78).

Except as to the date, the periods covered and the amounts, the checks were exactly alike. A photostatic copy of a specimen of the checks will be found on page 90A of the record. It will be seen that at the top of the check are the words, "The Yazoo & Mississippi Valley Railroad Company." In the lower left-hand corner are the words "To Treasurer, The Yazoo & Mississippi Valley Railroad Company" and the names of three banks, one in Chicago, one in St. Louis and one in Memphis, are given as banks through which the checks are payable.

An emblem of the **Illinois Central System** is found in the upper left-hand corner with the words "Illinois Central" printed across the emblem. At the bottom of the check is printed a similar emblem with the same words, and at the right of those words is the name "G. C. Lyon," both the last mentioned emblem and the name being under the word "Countersigned." In the right lower corner are the words "R. E. Connelly, Treasurer." On the back of each of the checks except the last two is the signature "L. E. Haney," which Mrs. Haney identified. On the last two checks dated December 15, 1939, and December 30, 1939, respectively (one of which is reproduced by photostatic copy on page 90A of the record), the following endorsement appears: "Pay to the Order of Mrs. L. E. Haney, Account deceased. The Yazoo & Mississippi Valley Railroad Company, A. B. Huttig, Assistant Treasurer, Countersigned G. C. Lyon." Then appears the endorsement, "Mrs. L. E. Haney."

Mrs. Haney further testified: My husband had a little button that he wore.

Q. What did the button say on it? A. I think it was the lodge he belonged to.

Q. Did it show any name or anything? A. I thought it had YMV on it.

On the same subject, Haney's son, Alvin Arthur Haney (Rec. p. 80) testified that he worked with his father during the Christmas season before his death. He said: "As far as I know, I thought I was working for the I. C. Railroad. I say that because I was hired in the Grand Central Station, the Illinois Central Station, and that was where I was paid by checks. I say I worked for the same railroad my father worked for because he got me the job and it was right down there with him. I got paid, as far as I remember, the same place he got paid. We got our checks in the Grand Central Station. I don't know whose office it was we went into. I didn't pay any attention to any signs on the office.

I saw my father wearing a button, an insignia of some kind, while I was there. As far as I remember, I thought it had 'Illinois Central' across the top of it, 'Railroad Brothers Trainmen' or something. He wore that on his cap while he was working."

On the same subject the daughter, Mrs. Marjorie Haney Linson, testified: "I have seen my father wear a button when he worked. It was a round button and it has 'Illinois Central' or 'I. C. Railroad' on it. It was just the initials 'ICRR.' He wore the button on his cap. He had a railroad pass and on that was 'The Illinois Central.' He had had it for several years, he had it for my mother and my brother and myself. I rode on it a number of times. It was renewed from time to time * * *. My mother or I could ride on that pass. We rode on it on the Illinois Central, and when we went on any other road we got a foreign pass, they call it. We could not ride on the Illinois Central pass on another road. The pass was made out to Lyman E. Haney, employee. All I can remember that was on it was that it had 'Illinois Central' on it and it was issued to

L. E. Haney, Employee. * * *. I believe the pass that I speak of had the name 'Illinois Central System' on it. I didn't see that it had Y&MV on it also. I never saw the button that my father wore on his coat or vest. The one on his cap had 'Brotherhood of Trainmen' on it. It did not have 'IC System' on it. It did not have Y&MMV on it. It had 'ICRR Brotherhood of Trainmen.' "

There was no evidence offered tending to show that the place where Haney was killed was inside of the terminal yards covered by the contract above mentioned or that said place was in anywise owned or controlled by the defendant Illinois Central Railroad Company.

It was admitted that the passenger train for which Haney had thrown the switch very shortly before he was killed was operated by the Trustee of the Frisco, who had been regularly and duly appointed, and that said train was an interstate train, operating between Birmingham, Ala., and Kansas City, Mo., through Memphis, Tenn., and that, therefore, both Haney (in throwing the switch) and said defendant trustees were engaged in interstate commerce; and it was also admitted that the Illinois Central Railroad Company was engaged in operating trains through various states at said time.

Defendants' Evidence.

On the part of the defendants the evidence tended to show the following facts:

When Brusco, I. C. switching foreman, went to the scene of the accident, as above stated, to learn why the switch light was not changed, he found Haney (Rec. p. 93) **14 feet west of the switch stand and his head was lying five feet nine inches from the north rail of the track and his feet were straight back of him 13 or 14 feet away from said north rail. There were two marks on the little mound of dirt and cinders which indicated that as he fell forward**

Haney's feet dragged down the south side of the mound, and those marks were plainly visible the morning following his death. His drawn pistol and his lantern were under him. - Bruso and Bundy, whom Bruso had promptly summoned to help him, turned Haney over and turned him around so that he was lying either on the mound or on the edge of it with the length of his body approximately east and west, and Bundy raised Haney's head, as already mentioned in an earlier part of this statement (Rec. p. 94).

Bruso then went to the shanty where Haney had his headquarters, broke the glass in the locked door (Rec. p. 94) and reached in and changed the overhead lights so that north and south bound traffic could proceed, and then he went on in the discharge of his ordinary duties.

About eight o'clock that evening Ora L. Young (a witness called by defendants), the Superintendent of Terminals for the Frisco in the Central station, went with Drashman to the scene of the accident. Only one trip was made down there. As they were on their way down there Mr. Young looked the train over on both sides and found nothing whatever out of order, no open doors, nothing swinging or projecting from the train, and nothing at all unusual on either side of the train.

On returning from the scene of the accident Mr. Young carefully inspected two cars which had been left in Memphis by Frisco train No. 106, a baggage car and the mail car (Rec. p. 106). He made a particular examination of the mail car at that time and testified fully as to the condition of the mail catcher arm which he had not been able to inspect before, because there were men working inside of that car whom he did not want to disturb. Everything about the mail catcher arm was in its usual condition (Rec. pp. 105-106).

On the morning following the accident Bruso accompanied two city police officers and a special agent of the

Frisco Railroad to the scene of the accident and pointed out to the police officers the place where Brusco had found Haney lying. A white pencil was placed at the point where the spot of blood coming from his head had been found and another pencil at the point where his feet were found. A photographer was present and he took two photographs of the scene, which were reproduced in the records as Exhibits A and B, respectively, and will be found on pages 102A-102B, respectively. The two white pencils show very plainly in Exhibit B.

As to the employment of Haney, the evidence on the part of the defendant Illinois Central Railroad Company showed very clearly that Haney was employed exclusively by the Yazoo & Mississippi Valley Railroad Company and was carried on the payroll of that company for many years. His superior, the trainmaster, Mr. Burns, who had been employed exclusively by that railroad for many years, testified that he knew Haney and knew that he was employed by that railroad alone (Rec. p. 132).

The evidence showed there are three railroads embraced in the system known as "Illinois Central System," to-wit: Illinois Central Railroad Company, which operates a line of railroad from Chicago, Illinois, to Memphis and points farther south; Yazoo & Mississippi Valley Railroad Company, which is a separate railroad corporation and operates a system of railroads in and about Memphis and other points in the South, and the Gulf & Ship Island Railroad, which operates a railroad in the southern portion of our country.

The Yazoo & Mississippi Valley Railroad Company, at regular intervals, billed the Illinois Central Railroad Company for two-twelfths of Haney's wages, representing the time he was employed in throwing switches and setting signal light for the Frisco Railroad trains (Rec. p. 112); the Illinois Central Railroad Company paid those bills and in turn collected said two-twelfths of Haney's wages from

the Frisco Trustees, pursuant to the terms of the contract above mentioned (Rec. p. 112).

The button worn on Haney's cap was a button such as the Brotherhood of Railroad Trainmen furnished to all its members every month, regardless of the railroad by which they were employed. The buttons were used as evidence to other men to show that their dues were paid up to date. **No such button ever bore the name or the initials of any railroad company.** A sample of such button is reproduced by photostat on page 110A of the record. The wording on it is "100% for my country and brotherhood," which legend begins near the rim of the button on the left side and runs over the top to the right side. At the bottom of the button is "Feb. 1943." In the center of it is a capital letter "T," which stands for trainmen, and that letter is in the center of a representation of the spokes of a wheel.

By the Frisco engineer, Mee, who was in charge of the engine on that same train, it was shown (Rec. pp. 125-127) that as the train moved backward towards the station onto the switch he was looking towards the rear of the train in an easterly direction and could see along the side of the train a considerable distance. He saw nothing projecting or swinging from the mail car or any other part of the train, and did not see Haney or any other person on the north side of that switch as the train passed over it.

It was also shown by Mee (Rec. p. 130) that rule 104 of the standard rules for train operations requires a switch tender under such circumstances as existed at said time and place, after throwing the switch to cross to the opposite side of the track and wait until the train passes.

Similar testimony was given by the witness Brusio when he was recalled to the stand after having given a part of his testimony (Rec. p. 131).

We repeat, there was not a particle of evidence anywhere in the entire record showing or tending to show that this respondent owned or controlled the track on

which the Frisco train was being operated on the night of Haney's death, or that it owned or controlled in any way the ground on which such track was located, or the ground on either side thereof. On the contrary, the undisputed evidence clearly showed that said track was laid in a **public street of the City of Memphis, Tennessee** (Rec. p. 107).

Counsel for this respondent pointed out in their original brief filed herein on pages 15 to 22, inclusive, a number of erroneous statements contained in the petition for the writ and in the brief of petitioner in support thereof. Some of those erroneous statements have been omitted from the new brief filed by petitioner, and such of those as are repeated in that brief will be pointed out here now.

On page 7 of Petitioner's new brief is the statement that Haney was found "about five feet north of the north rail of the track over which the train had passed **with his head pointing in the general direction in which the train had just backed in.**" This statement is exactly contrary to the testimony of plaintiff's own witness, Bandy, and to that of respondent's witness Brusso, as previously pointed out in this statement. Bandy's description of the position of Haney's form being found on pages 26 and 175, and Brusso's on page 93 of the record.

Near the bottom of page 7 of said brief is the erroneous statement, "the evidence showed that when this mail car swayed or moved around a curve, the mail hooks would pivot and swing out from the side of the car from 12 inches to 3 feet." The evidence of plaintiff's expert witness Farmer, the mail clerk (record pages 82-84), was to the effect that **under no circumstances could the mail catcher arm, which plaintiff called the mail hook, swing out more than 12 inches from the side of the car**, and then only if the train was moving rapidly around a curve or over a rough track. The only way the mail catcher arm could be made to extend out as much as three feet, or anything

like that much, would be when the door of the mail car was open, and the handle was pulled inward and downward from the inside of the car. Drashman's testimony was to the same effect (record page 64). There was no evidence that the door was open, that anybody pulled a lever down, or that there was any occasion to do so. At the bottom of said page 7 is the statement that the train was moving around a bad curve at the time Haney was killed. The evidence does not show when Haney was killed, whether it was while the train was backing past him or after it had completely cleared the switch point. The evidence further shows (see plat, record page 88) that the switch point was right at the beginning of the curve, and a mark placed on the plat west of the switch point, which was at a distance of 14 feet therefrom, shows that the track was straight at that point. Therefore, while most of the train had gotten upon the curve on the switch track, whatever part of the train passed the point where Haney was found unconscious passed that point on a straight track.

Near the top of page 8 of said brief is the statement, "the mail hook could, therefore have struck Haney in the back of the head." That statement is incorrect, for if Haney was standing on the level ground between the switch track and the gravel and cinders, the lower end of the mail catcher arm, even when against the side of the car, was $12\frac{1}{2}$ inches above his head, and if raised, it was at a height of nine feet, which was far above his head; while if Haney was standing on the elevation of the gravel and cinders, he was at least 10 feet from the track and therefore clear out of reach of the mail catcher arm when extended as far as possible.

On said page 8 petitioner quotes what Haney's son, Alvin Haney, said as to the position of a spot which he saw on the morning following Haney's death and which he **believed** to be a blood spot. In the first place, Alvin Haney

testified that the blood spot was **east** of the switch stand, and that the ground was **rough at that place**. There is no substantial evidence, but only an inference which might be drawn from young Haney's guess, that his father was found at that place. He did not see his father at all, before he got to the hospital, and the pictures, as above pointed out, show that the ground at the place approximately 14 feet west of the switch stand, where Haney was actually found by Bundy and Brusso, was level for a distance of about 10 feet north of the track.

In the next to the last paragraph on said page 8 is the statement that Haney's pistol had slipped out of his pocket and was found under his body, when he was turned over. This is based purely on the surmise of witness Bundy, under leading questions by petitioner's counsel. Bundy **supposed** that was what had happened. But Mrs. Haney, who testified for respondent (R. 78), testified that her husband carried his pistol in a scabbard. It is a matter of common knowledge that policemen carry their pistols in holsters and have to release a flap ~~before~~ a pistol can be drawn.

Again, in the same paragraph, petitioner's counsel state their **conclusion** that the mail hook struck Haney. We differ with them in that conclusion, and no evidence sustains their conclusion.

On page 9 of said brief, in the middle of said page, three questions and answers are quoted from page 175 of the new record. Petitioner gives the paging of the old record. His quotation makes Bundy say that Haney's head was pointing **southwest**. That is evidently a misprint. We have already quoted from Bundy's testimony on page 26 of the record and if the court will turn to page 175 thereof from which petitioner quotes the three questions and answers above mentioned, it will be found by reading all of that portion of Bundy's testimony that it is correctly summarized on page 26 of the record, and shows that

Haney's head was 5½ feet north of the track and his feet extending straight back from him towards the north were ten feet from the track. He was, therefore, not lying parallel to the track or with his head pointing in the direction towards which the train was backing (R. 27, 28, 93, 94, 95).

On said page 9 it is stated that Drashman testified that Haney's body was lying parallel to the track. His own testimony showed that he was so confused on the subject that he did not know what he was talking about. The testimony of plaintiff's own witness Bundy, as well as that of respondents' witness Brusso, showed clearly that they had lifted Haney and turned him around, completely changing his position before Bundy or anybody else arrived on the scene (R. 28, 94).

On page 10 of said brief, in the last paragraph thereof, it is stated that the evidence showed that the Illinois Central Railroad Company furnished Haney with a dangerous place to work because of the presence of the high ground and because there was no artificial light at that place. The evidence does not bear out that statement, for there is no evidence anywhere in the case tending to show that the Illinois Central Railroad Company had any control of said place, and the only evidence on the subject—that of Mr. Young—showed that it was in a public street belonging to the City of Memphis (R. 107).

In various places in said brief it is stated that the Supreme Court of Missouri held that the mail hook could have struck Haney, but did not do so. No such statement is to be found anywhere in the Court's opinion, which is not only found in the printed record, but is attached as an appendix to the brief of counsel for the Frisco Trustees.

SUMMARY OF ARGUMENT.

1.

The Supreme Court of Missouri properly reversed the judgment of the trial court because the latter court had erred in overruling this respondent's demurrer to the evidence at the close of all the evidence in the case, for the following reasons:

(a) The hearsay statements of an unknown man in the group gathered at the scene of the accident some time after it occurred, which the trial court permitted a witness for plaintiff to repeat, did not meet the requirements of the rule relating to admitting statements as part of the res gestae, because, admittedly, the man who made it was not present when the accident occurred and on its face it purports to be only a **guess** about how the accident **might** have happened. There was no other evidence to show how Haney was injured.

The evidence offered by plaintiff conclusively showed that nothing sticking out of the train or swinging from it struck Haney.

Hence, the demurrer to the evidence should have been sustained.

(b) Even if it could be said that plaintiff's evidence tended to show that some object protruding from or swinging from the train might have struck Haney (an impossible assumption, as he was at least a foot shorter than the height of the mail arm above the ground), this incredible assumption is far less probable than the one that Haney was assaulted and robbed. The Supreme Court of Missouri was right in holding there was no substantial evidence to prove how the accident occurred. On pages 102-A, 102-B of the record are photographs, marked, re-

spectively, defendant's Exhibit A and defendant's Exhibit B. Both of them show the higher ground consisting of cinders and gravel on which it is claimed Haney was standing when struck by something. But it is shown without dispute in the evidence that the edge of this higher ground or cinders was at least ten feet from the rail (defendant's Exhibit B, record page 102-B), much too far away for him to have been struck by the mail arm which, when extended, reached but 36 inches from the car (Rec. p. 83). When out this far it is nine feet above the rail (Rec. p. 83). Those photographs show that the ground was perfectly level between the switch track and the higher ground, consisting of cinders and gravel, a distance of ten feet. (Defendant's Exhibit B, Rec. p. 102-B.) The evidence of plaintiff's witness, Farmer, shows that if Haney was standing on level ground of the same height as the ties (as the evidence shows the ground was) it would have been physically impossible for the mail catcher arm to strike him because, even when at rest, the lower end of it was 80 inches above the ties, while plaintiff's witness, who was the son of Haney, testified his father was 5 feet 7½ inches tall, which would be 67½ inches, or 12½ inches lower than the lower end of the mail catcher arm. The evidence showed that the higher ground of cinders and gravel was so far from the track that if Haney was standing upon it the mail catcher arm could not under any circumstances reach out far enough to touch him (Rec. p. 83). The photograph Exhibit B showing the switchstand demonstrates clearly that the ground in the space between the Frisco track and the pile of cinders and gravel was on the same level with the ties.

The demurrer to the evidence should therefore have been sustained.

(c) Even if the evidence had shown that Haney's death resulted from being struck by an object projecting or

swinging from the Frisco train, the accident would have been so unusual that it could not reasonably have been foreseen by a reasonably prudent person in this respondent's situation in the exercise of ordinary care, and, for such an accident, a defendant is not liable. Hence, this respondent's demurrer should have been sustained.

(d) A master cannot be held liable for an injury to a servant which results from a defect in an appliance or in a working place furnished the servant, unless it is shown that the master had either actual knowledge or constructive notice of such defect.

Neither actual nor constructive notice of an object projecting or swinging from the Frisco train was brought home to the appellant, Illinois Central Railroad Company, and hence respondent's case against it falls to the ground, even if Haney was an employee of the Illinois Central Railroad Company, which the evidence disproves.

(e) There must be a duty owed and a breach thereof before there can be negligence. The duty to keep the streets on which the Frisco track was laid properly illuminated, and free from obstructions, such as piles of gravel and cinders, rested upon the City of Memphis, not upon this respondent, for it had no control of the street and no duty or right to light it or remove cinders or gravel from it, and hence this appellant could not be held guilty of a breach of such duty. That made it mandatory to sustain the demurrer to the evidence.

(f) The presence of the cinders and gravel was not a proximate cause of Haney's death. He could have stood upon the gravel and cinders safely all night if a separate intervening cause had not produced his injury and death. The proximate cause is what the law regards; and a causal connection between an alleged negligent con-

dition or act and injury or death must be shown or there can be no recovery on that account.

(g) The plaintiff sued the wrong railroad as Haney's employer. The suit was erroneously brought against Illinois Central Railroad Company. Documentary evidence identified by plaintiff's witness, Haney's widow, as well as overwhelming and uncontradicted oral testimony offered by this appellant, showed conclusively that Haney's employer was not Illinois Central Railroad Company, but the Yazoo & Mississippi Valley Railroad Company (a separate and distinct corporation operating its own line of railroad) which was not made a party to this suit.

One who was not an employee of a defendant at the time of injury cannot recover damages of such defendant for such injury, nor can his personal representative maintain a suit under the Federal Employers' Liability Act for damages for his death.

For that reason the demurrer to the evidence should have been sustained.

ARGUMENT.

I.

The demurrer to the evidence at the close of the case should have been sustained and the Supreme Court of Missouri was right in so holding because:

(a) No admissible evidence whatever tended to show that Haney was killed by an object protruding from or swinging from the Frisco train. Plaintiff himself disproved his allegation to that effect.

The hearsay testimony as to a declaration by an unknown person in a crowd some time after Haney had been injured was admitted on the theory that such declaration constituted a part of the *res gestae*. Not only was this statement made by a person who was not present at the time of the accident, but it is a recital of what someone else said, and admittedly is a guess about how the accident might have happened. It does not purport to be a statement of fact (Rec. pp. 40-62). The witness was permitted to testify that someone else, unknown to him, who said he did not see the accident, "thought" or "supposed" something "might" have been sticking out from the side of a car. This hearsay evidence, twice removed from testimony which might be dignified as legal proof, is the sole basis for submitting the case to a jury. Aside from that statement, the record is entirely bare of any suggestion of an object protruding or swinging from a car.

RES GESTAE.

Bouvier's Law Dictionary defines the term "*res gestae*" thus: "Transaction; thing done; subject matter."

Webster's New International Dictionary (2 Ed.) defines it thus: "The facts which form the environment of a liti-

gated issue; the things or matters accompanying and incident to a transaction or event."

The Century Dictionary defines it thus: "Things done; material facts."

In order, therefore, for anything to be a **part of the res gestae** it must be a **part of the transaction or thing done or subject matter**; or a **part of the facts which form the environment of a litigated issue or of the things or matters accompanying and incident to a transaction or event**; or a **part of the things done or material facts**.

We find the following in Wigmore on Evidence, 3rd Ed., Section 1751:

"* * * The declarant must appear to have an **opportunity to observe personally the matter of which he speaks**. This requirement is in practice usually fulfilled in the case of all declarations otherwise admissible; for they are made by injured or others present and concern the circumstances of the injury as observed by them; and thus no occasion arises for calling attention to the requirement. Nevertheless, in an appropriate case, it would without doubt be enforced; for example, if a passenger in a railroad collision should exclaim 'the engineer did not reverse the lever' or 'the conductor did not read the train dispatcher's orders.' " (Emphasis ours.)

It is unnecessary to burden the court with a lengthy discussion of all the decisions, but we respectfully submit that, under the rule which is well established by such decisions and by eminent text-writers, the statements by the witness Drashman, called by the plaintiff in this case, to the effect that **some** man, who was **unknown** to him, standing in a little group of men which the witness reached after walking half a mile or more, following his learning of the accident, to the effect either that he **thought** something sticking out of the train struck Mr. Haney, or that

something sticking out of the train struck him, or was supposed to have struck him, were clearly inadmissible.

- Wigmore on Evidence, 3rd Ed., Sec. 1751;
Barker v. St. L., I. M. & S. Ry. Co., 126 Mo. 143;
Redmon v. Met. Str. Ry. Co., 185 Mo. 1;
Ruschenberg v. So. Elec. Ry. Co., 161 Mo. 70;
Bankers' Life Ins. Co. v. Reynolds, 277 Mo. 14, l. c.
22-24;
Landau v. Travelers Ins. Co., 276 S. W. 376;
4 Chamberlayne on Ev., 2893;
3 Wigmore on Evidence, 2nd Ed., Sec. 1747;
Woods v. So. Ry. Co., 77 S. W. (2d) 374;
22 C. J. 462, Sec. 550;
Seonce v. Jones, 121 S. W. (2d) 777;
Johnson v. So. Ry., 175 S. W. (2d) 802;
32 C. J. S., Sec. 410, p. 24;
Hartford Fire Ins. Co. v. Kiser, 64 Fed. (2d) 288;
Vicksburg & Meridian R. Co. v. O'Brien, 119 U. S.
99;
Beck v. Dye, 92 Pac. (2d) 1113 (Wash.);
Schuman v. Bader & Co., 227 Ill. App. 28;
Hines v. Patterson, 225 S. W. 642 (Ark.);
Tex. Int. Ry. Co. v. Hughes, 53 S. W. (2d) 448
(Tex.).

Plaintiff's counsel convinced the trial court that such hearsay statements by an unknown person, **who did not even claim to have been present when the accident occurred or to have seen it** (Rec. p. 52), were admissible as part of the res gestae.

Such statements were not admissible as part of the res gestae, because there was no evidence tending to show that the unknown man in the group was present when the accident occurred, and, in fact, the plaintiff's witness, Drashman, from whom such statements were elicited at the trial expressly stated that **the man who made the statements did not claim to have been there when the accident happened or to have seen it** (Rec. p. 52). It was

essential to show that he was present. That burden was on plaintiff.

The rule is that in order for such statements to be admissible they must have been made **contemporaneously with the happening of the accident or at a time so closely connected therewith that the witness had no time to reflect so as to make up a story that was not true**; or, if the person making such statement had been rendered unconscious in the accident, then no matter how long he was unconscious, if he made the statement so promptly after regaining consciousness that it was spontaneous and without time to manufacture an untruth, the statement may be considered a part of the *res gestae*, provided, further, that the witness is shown to have personal knowledge of the facts concerning which he speaks.

Under the authorities the quoted statements could not be properly admitted, since the man who is alleged to have made them was not rendered unconscious, was not suffering from the effects of any violence (since he was not the one who was hurt), was not shown to have any personal knowledge on the subject of which he spoke, and at most was relating nothing more than the surmise of an unknown person who did not even see the accident!

In Chamberlayne on Evidence, Vol. IV, 2893, the following statement is found:

“To judicial administration, the automatic is the true. What a declarant asserts, not so much of himself as overborne and forced thereto by overwhelming emotion, the stress of sudden shock or intense pain, the law of evidence assumes to be the fact. That which judicial administration, nervous, as it were, at being deprived of the test of cross-examination, the greatest guaranty for the discovery of truth which the English jurisprudence has as yet been able to devise, fears in connection with such statements is reflection, the opportunity for adjusting facts to self-interest, con-

sciously or unconsciously blending the true and false, coloring, distorting and preventing that which is real. In an instinctive automatic utterance, where the declarant speaks from his subjective or soul-mind rather than from the promptings of that which is habit, really conscious, this element of reflection is largely, if not wholly, absent. The speaker is not so much voluntarily declaring himself as instinctively reacting to an outside stimulus. More physically considered, it would rather seem that the transaction is speaking through the declarant than that the latter is consciously talking about the transactions."

Professor Wigmore, in III Wigmore on Evidence, 2 Ed., Sec. 1747, says:

"This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control; so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts."

The admissibility of a statement or an exclamation of a bystander is discussed in 32 C. J. S., Section 410, p. 24, as follows:

"In order for a declaration or statement to be admissible as part of the *res gestae*, it must appear that it was made by one who either participated in the

something sticking out of the train or swinging from it inflicted the blow which caused Haney's death (and not only is it not equally probable but it is not even possible) as that some unknown assailant struck him from behind, one state of facts being no more clearly shown than the other (the most plaintiff can claim) plaintiff's case would necessarily fail because it cannot rest on mere conjecture and surmise.

- Hamilton v. St. L. & S. F. Ry. Co., 300 S. W. 787;
Bates v. Brown Shoe Co., 116 S. W. (2d) 31;
Pape v. Aetna Cas. Co., 150 S. W. (2d) 669;
Lappin v. Prebe, 131 S. W. (2d) 511;
Penn. R. R. Co. v. Chamberlain, 53 Sup. Ct. Rep. 391;
N. Y. C. R. R. Co. v. Ambrose, 50 Sup. Ct. Rep. 198;
C. M. & St. P. R. Co. v. Coogan, 271 U. S. 472;
Patton v. Tex. & Pac. Ry. Co., 179 U. S. 658;
C. & O. Ry. Co. v. Stalpeton, 299 U. S. 587, 53 Sup.
Ct. Rep. 591;
A. T. & S. F. Ry. Co. v. Toops, 281 U. S. 351, 50
S. C. 281;
A. T. & S. F. Ry. Co. v. Saxon, 284 U. S. 458, 52
S. C. 229;
Gunning v. Cooley, 281 U. S. 90-94, 50 Sup. Ct. 231.

But the plaintiff went further and completely obliterated every chance of recovery on presumptions or circumstantial evidence by showing by Drashman, a witness whom plaintiff's counsel placed upon the stand, that said witness, after learning of the accident, inspected the Frisco train over its full length on both sides and that nothing whatever was found protruding from the train or loose on the side of the train so that it could have swung out as it passed the decedent (Rec. p. 57). This was corroborated by defendant's witness, Young (R. pp. 104-105).

Discovering, no doubt, that he had completely ruined his case by the testimony of the witness whom he had put on the stand, plaintiff's counsel attempted to establish

the theory that the mail catcher arm which was fastened on the side of the mail car swung out from its position and struck Haney as it passed.

But that effort also ended in a dismal failure, for the railway mail clerk, Farmer, whom plaintiff called as a witness and who was a man of experience, from which he had learned all about railway mail cars, how they are equipped and the position and action of such mail catcher arms, gave testimony which showed conclusively that, under no circumstances whatever, could the mail catcher arm have swung out more than one foot from the side of the car; that the lowest part of it was **eighty inches (6 feet 8 inches)** above the ground (which would have been **more than a foot above Haney's head if he were on the level ground and more** than a foot above his head if he had been standing on the higher ground farther away), because in that case, assuming that the mail catch arm which, **when raised**, extended but 36 inches from the car, would be nine feet above the bottom of the rails [R. 83]. The higher ground, consisting of gravel and cinders, was but 18 to 20 inches above the rail [R. 57], so Haney, 5 feet 7½ inches tall [67½ inches], would have been below the mail arm if standing there. Furthermore, as has been shown, the high ground was far beyond the reach of the arm in any position [Defts. "Ex. B," R. 102A; see, also, 102B], and that the only way the arm could be made to operate was by opening the door of the mail car and using a lever on the inside of the door of the car for that purpose. There was no occasion to raise it, for there was no railroad platform anywhere near the scene of the accident and consequently nothing on which a mail sack could be hung so that it might be taken off by means of the mail catcher arm.

There was not even a scintilla of evidence tending to show that anything protruding from the side of the train

transaction or witnessed the act or fact concerning which the declaration or statement was made. As this rule implies, it is not necessary, in order to render a statement or act admissible as part of the *res gestae*, that it should have been made or done by one of the participants in the main transaction, but ~~if~~ it has the necessary connection with the main fact, it may be admissible, no matter by whom it was made or done, **provided, in the case of a declaration, it relates to a matter of fact to which declarant might testify if called as a witness.** Accordingly, the exclamations or declarations of a mere bystander may be admissible as part of the *res gestae*, although there are numerous cases in which such declarations have been excluded." (Emphasis ours.)

Applying the rules and tests announced by the foregoing authorities, it seems too plain to require argument that evidence of the statements made by the unknown man who "looked like an I. C. switchman," according to the witness, should never have been admitted, but having been admitted, it should be treated as absolutely no proof at all because having no probative worth whatever. The pages of the record on which those statements are printed might as well be blank pages, for the statements themselves are so utterly worthless that they cannot be considered in passing on the demurrer to the evidence.

Bearing in mind the rule to the effect that the statements must be **spontaneous** and that the burden of proving spontaneity rests upon the plaintiff who offers proof of such statements, let us see whether such statements were, under the evidence, spontaneous, or whether they were merely a guess about what might have happened.

Did plaintiff bear the burden of showing that they were spontaneous utterances by a person who was present when the accident occurred and saw for himself what happened? That is the first question of all to be settled. The evidence absolutely fails to show any fact from which the jury

could find that the man in the crowd who "looked like an I. C. switchman" was present when the accident occurred. The witness who testified that some man in the crowd stated that something sticking out from the side of the train hit Haney or that he **thought** something sticking out from the side of the train hit him, or that it was supposed to have hit him, expressly testified that **that man did not claim to have seen the accident** (Rec. pp. 40, 62). Not only did the plaintiff fail to bear the burden of showing that the unknown person was present, but he proved by his own witness that such unknown person **did not claim to have been present when the accident happened** (Rec. pp. 40, 62). That fact in itself is sufficient to exclude the testimony, for if the man was not at the scene of the accident when it occurred, there could be no such thing on his part as a spontaneous utterance which was so closely connected with the happening of the accident when it occurred, that it could be said to be a part of the *res gestae*. That unknown man could not have testified to what he had not seen if he could have been found and called as a witness, because such testimony would have been purely hearsay.

Again, plaintiff failed to meet the requirement of the rule regarding such evidence, because his own evidence expressly showed that the statements, if made at all, were made so long after the occurrence of the accident that the unknown man in the crowd making the statement had ample time to reflect upon what he had either seen or heard and to make up a story which may have been based upon his own conclusion from things that he saw after the accident happened, or from the statements of others, either as to what they saw or what they concluded from the facts that they learned.

The evidence of plaintiff's witness was that he was up at the station, which the evidence showed was, in the night

time, more than half a mile away from the scene of the accident, when he learned that a man had been hurt down at the Frisco switch, which was the place near which decedent was found unconscious. This witness testified that he and another witness walked through the railroad yards, a distance of over half a mile, and when they got down to where the plaintiff's decedent was lying a gang of switchmen were there (Rec. p. 59).

It does not appear how long after the accident the news got to this witness. After somebody saw the injured man upon the ground the news in some undisclosed way eventually reached Mr. Young at the station, half a mile from the scene of the accident, and he told the witness and they walked to the switch. In addition to that, it will be recalled that it was sometime after the Frisco train had passed the scene of the accident before a witness from the railroad yards went up to the switch to see why the light had not changed after the train had gone in, and he there found Haney. All the time necessary for those things to happen had elapsed before the unknown man in the crowd made his alleged statement.

Since the test of the admissibility of evidence of such statements is **spontaneity**, and since there is a total failure of proof of spontaneity by plaintiff upon whom the burden of proof on that subject rested, it necessarily follows that the evidence of such statements should have been excluded, because it was mere hearsay. The most strenuous and repeated objections were made to such evidence, but the court continually overruled all such objections.

While it is true that the length of time elapsing after the happening of the accident varies in different cases, and it need not always be shown that the statement was made at the scene of the accident, nevertheless in every case it will be found that the statement must have been made **spontaneously at the earliest possible moment after the**

accident occurred and by one who has personal knowledge of the fact. A man may have been knocked unconscious in the course of an accident. He may not have come to for three or four days, but if, as soon as he is able to talk intelligently he makes a statement as to how the accident happened, **if he saw it**, and the surrounding circumstances show that the statement is made spontaneously without any opportunity or attempt to make up a story or color the facts in any way, then the test of spontaneity is met and the evidence may properly be received.

But in this case it is not claimed that the speaker in the crowd was rendered unconscious; on the contrary, he was not even shown to have been present when the accident occurred. Of course his statement to the effect that he **thought** some object sticking out of the side of the car had hit Haney was inadmissible because it was a mere expression of opinion. No rule of law permits one to **guess** how an accident **might** have occurred simply because the guess is made shortly after the accident. A guess is nevertheless a guess even though made promptly.

Such statements do not amount to anything. A verdict cannot be based upon them. A court, because such statements were improperly admitted cannot consider them in passing upon the demurrer to the evidence. We do not have here a case (like some cases) where defendant's counsel allowed the hearsay evidence to be admitted without objection. The record reveals the most determined and persistent efforts on the part of counsel of both defendants to keep such evidence out of the record. It was repeatedly objected to as hearsay; motions were made to strike it out after it was admitted; and motions to discharge the jury on account of the bringing out of such improper testimony were made, and an instruction was requested, withdrawing it from jury's consideration, but all to no avail. The trial Judge simply could not see our point.

The question of the admissibility of this evidence is not a Federal question. It should be left to the Missouri court for determination. The Supreme Court of Missouri has held the evidence to be inadmissible under the law of that state. Its decision is final under the decision of this court in *Erie v. Thompkins*, 304 U. S. 64, 58 Sup. Ct. 817.

(b) Eliminating the statement made by the unknown man in the group standing around Haney while unconscious from his injury, which statement must be eliminated in view of all of the authorities above cited, what have we left in this case on which plaintiff can base a right of recovery? The theory of the third amended petition on which the case was tried was that something was sticking out of or swinging from the Frisco train as it passed the point where Haney was standing after he had thrown the switch on the occasion in question, and struck him.

We shall demonstrate under another heading that even if plaintiff had offered evidence tending to show that some object sticking out of or swinging from the train actually killed Haney, the appellant, Illinois Central Railroad Company, could not be held liable for Haney's death on that account.

But it is important first to consider whether there was any evidence tending to show that some such object either sticking out of or swinging from the train caused Haney's death.

Not only does the evidence show that it was a physical impossibility for the mail catcher arm, 80 inches above the ground where Haney could have stood on the level of the ties to have struck him, but the authorities which we shall presently cite, and many others which could be cited, make it perfectly clear that where the most that can be said in favor of a plaintiff's case is that the injury could have resulted from a cause for which defendant was liable,

or that it could have resulted from a cause for which the defendant was not liable, and where the evidence leaves the matter entirely to speculation or guesswork to determine which cause did produce the injury, the plaintiff has wholly failed to make a case and it is the duty of the trial court to sustain a demurrer to the evidence. If the trial court has overruled the demurrer under such circumstances, it is the duty of the appellate court to reverse the judgment outright, as was done by the Supreme Court of Missouri.

Aside from the statement of the unknown man in the group above referred to (which is to be disregarded as hearsay), plaintiff's evidence at most merely tends to show that Haney was standing some distance away from the switch track when the train passed, or after it passed. **The undisputed evidence, offered by plaintiff, showed that Haney had been struck on the back of the head to the right of the middle line and his skull had been fractured at that point.**

There is no theory which the evidence tends to support which would justify a finding that something from the train struck or could strike Haney in the back of the head or on the right side of his head.

If, as is virtually certain, an assailant quietly slipped up behind him with a drawn pistol or with a piece of pipe and struck him a violent blow upon the back of his head, it could easily have fractured his skull in the back part of his head and would certainly have caused him to fall forward and land just where he was found unconscious a short time later. Tough characters frequented that place constantly. (Rec. p. 24).

Plaintiff's witness, Dr. Turner, testified the wound could have been caused by a gaspipe or club or similar round object in the hands of some individual (Rec. p. 66).

Even if it could be said that it was just as probable that

or swinging out from the side of the train struck Haney, and plaintiff's own evidence showed positively that such a thing did not and could not happen.

Physical facts are far more trustworthy than the memory of a witness. The sympathies of a witness for one side or his prejudices against the other side in a law suit may cause him intentionally to misstate facts; and the frailty of the human mind, which is well known to all courts, may cause a witness to misstate facts unintentionally. But where physical facts are shown by the plaintiff in a damage suit and where they are so clearly shown as to reveal beyond any chance of error or mistake that an accident could not have happened as claimed by plaintiff, then all courts recognize the rule that the physical facts prevail and evidence given with the intent to contradict them or inferences sought to be drawn which are contrary to them are worthless and should be wholly disregarded by the courts.

Let us give attention to some of the physical facts which the plaintiff himself proved by his own witness Bundy. It will be recalled that Brusco first discovered the unconscious form of Haney and hurried back into the yards, directed an employee to call an ambulance and taking plaintiff's witness Bundy with him returned to the point where he had found Haney and where he was still lying unconscious.

The petitioner tries very hard to distort the testimony of his witness Bundy by saying that Bundy testified to facts which showed that Haney was lying parallel to the Frisco switch track with his head pointed in the direction in which the train was moving when it passed the switch. The testimony of Bundy cannot be fairly construed as bearing out that statement; on the contrary, it proves exactly the opposite state of facts, showing clearly that Haney's head was pointing almost directly South towards

the switch track while his feet were straight back North of him. We find on pages 26 and 27 of the record as printed for this court, the following testimony given by Bundy, "He was north of the switch and a little to the west of it; probably two or three feet west. His head was pointed south, kind of on an angle. The Frisco track runs east and west at that point. Haney's head was pointed a little south and east and his feet extended northward, kind of on an angle. I would say Haney's head was about six feet from the switch, that is north of it, and a little to the west. I think Haney was about 5 feet 10 inches in height. (Note, Haney's son, who knew his father's height, testified [Rec. p. 81], 'My father was about 5 feet 7½ inches tall.') I would say his feet were about 10 feet North of the North rail of the Frisco track and extended straight back of him, not doubled under him."

From the testimony of plaintiff's own witness, Bundy, showing that Haney was lying with his feet 10 feet North of the Frisco switch track and his head towards the south, the fact is established that Haney was standing at least 10 feet North of the North rail of that switch track when something struck him (Rec. p. 27).

To repeat, allowing even 2 feet from the overhang of the side of the mail car to the North of the North rail of the track, that would leave the distance between the north side of that mail car and the place where Haney was standing at least 8 feet. Even if he was elevated 2 feet above the level of the ties, standing on the cinders and gravel (which evidence shows but 18 to 20 inches high [Rec. p. 66]), Haney would be so far North from the side of the passing car that it would have been impossible for the mail catcher arm to have touched any part of his anatomy, even if a man on the inside of the car had opened the door and pulled the lever controlling the motion of the mail catcher arm downward and inward so as to swing

the mail catcher arm out to the very limit to which it could be extended it could not have been swung out more than 36 inches. That is proved by the testimony of plaintiff's own witness Farmer (Rec. pp. 83, 84). Without being pulled up by aid of that handle the mail catcher arm cannot swing out more than 12 inches, as Farmer testified (Rec. p. 84). Therefore, even if the mail catcher arm had been swung out 36 inches from the side of the car it would have lacked the difference between 36 inches and 8 feet (which difference is 5 feet) of swinging out far enough north to touch Haney. It could not have knocked him down no matter how he was lying when found. If, therefore, Haney was standing on the cinders and gravel he was in a perfectly safe place so far as danger of being struck by the mail catcher arm was concerned.

If Haney was standing on the level ground between the north rail of the Frisco switch track and the cinders and gravel it would have been absolutely impossible for the mail catcher arm to have struck him, whether it swung out 12 inches as it could do under some circumstances without the use of the lever, or whether it was operated by means of the lever. This is because, as Farmer, plaintiff's own witness, testified emphatically the lower end of the mail catcher arm when down by the side of the car is 80 inches above the ties (Rec. pp. 83 and 84).

This is not disputed.

The four photographs reproduced in the record as printed under the supervision of the Clerk of this court on pages 102a, 102b, 102c and 102d, are reproductions of the pictures which were set forth in the original record opposite page 120. Those in the record printed especially for this court are not as clear as those which were printed in the original record filed with the petition for a writ of certiorari and printed opposite page 120 thereof as above stated, but they are clear enough fully to support

our contention. From those photographs it appears very plainly that the ground between the north rail of the Frisco track and the cinders and gravel, about 10 feet north thereof, is not only level, but is on a level with the ties of that track. That fact appears indisputably from the photograph, Defendant's Exhibit B, on page 102B of the new record and opposite page 120 of the record filed in this court. It also appears very plainly that the switch stand near which Haney was standing when injured was standing on ties which were on a level with the ties of the track. Although both Mrs. Haney and her son, Alvin, were recalled to the witness stand (Rec. pp. 136-137) after all the photographs and other exhibits had been admitted in evidence, and both of said witnesses had been over the scene of accident, neither of them denied the correctness of these photographs. It, therefore, appears that Haney, if standing between the switch track and the cinders and gravel, was standing with his feet on a level with the ties. It will be remembered that Farmer gave the distance from the bottom of the mail catcher arm when at rest to the top of the ties as 80 inches, which is, of course, 6 feet 8 inches. If Haney stood in that space the top of his head was 5 feet $7\frac{1}{2}$ inches (a total of $67\frac{1}{2}$ inches) above the level of the ties, while the mail catcher arm when at rest extended down to a point 80 inches above the level of the ties, and could not come lower than that; so that if Haney was standing in that space the top of his head was $12\frac{1}{2}$ inches lower than the mail catcher arm when it was at rest, and when it was raised, as shown in defendant's Exhibit D on page 102 of the record, it was 9 feet above the level of the ties, which would be 108 inches. (See Farmer's evidence, Rec. p. 83.) Of course, if it was 9 feet, or 108, inches above the level of the ties, that would be $40\frac{1}{2}$ inches or $3\frac{1}{2}$ feet higher than Haney's head. This, of course, is repetition of what has been said before, but it will bear repetition because conclusive.

Under no circumstances, therefore, could Haney have been struck by the mail catcher arm, and petitioner has abandoned all contentions of anything else protruding or swinging from the side of the train.

On the subject of the value of physical facts over mere opinions or recollections of witnesses see:

Kelly v. Jones, 290 Ill. 375;

The People v. Bentley, 357 Ill. 82;

Dunn v. Alton R. Co., 104 S. W. (2d) 311;

Alexander v. St. L. San. F. R. Co., 289 Mo. 599.

Facts necessary to recovery may not be inferred from proven facts in the face of positive, and otherwise uncontradicted testimony of unimpeached witnesses which consistently with facts proved shows the facts sought to be inferred do not exist.

* Penn. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391;

George v. Mo. Pac. R., 213 Mo. App. 668;

Southern Ry. Co. v. Walters, 284 U. S. 190.

This makes the plaintiff's case far more clearly one without any foundation than even the class of cases referred to where either of two causes might have produced the injury, but the evidence failed to point clearly to the true cause. This reason for holding that petitioner could not recover is even stronger than the one assigned by the Supreme Court of Missouri. Surely this is not a case where the court can wash its hands of responsibility to pass on the question of liability **upon the record** and say the question was one for the jury. There was nothing for the jury to pass on. A jury may not be permitted to say that the **impossible** has happened. Nor may a jury be permitted to return a verdict against even a railroad company on a mere **guess** that an accident **might** have happened in a certain way.

(c) The Illinois Central Railroad Company, even if held to be the employer of Haney, could not be held liable in this case, even if his fatal injury was caused by some object sticking out of the Frisco train or swinging from it, because it had no notice, actual or constructive, of the alleged defect.

If the evidence had showed (as it did not) that some object protruding from the train or swinging from it fatally injured Haney, there certainly was no evidence anywhere in the entire record tending in the least degree to show actual or constructive notice on the part of the defendant, Illinois Central Railroad Company, of the presence of such object on the side of the train or swinging from it.

A defendant is not required to use his imagination to study up things that he can conceive might possibly happen, disregarding entirely ordinary human experience and his own experience.

Ward v. Ely-Walker D. G. Bldg. Co., 248 Mo. 348;
Urie v. Thompson, Tr., 176 S. W. (2d) 471;
Brewing Assn. v. Talbot, 141 Mo. 674;
State ex rel. v. Ellison, 271 Mo. 463;
Nelson v. C. Heinz Stove Co., 8 S. W. (2d) 918;
Brady v. So. Ry. Co., 320 U.S. 476, 64 S. C. 232;
A. T. & S. F. R. v. Calhoun, 213 U. S. 1.

The train in question was not a freight train, but a vestibuled passenger train (Rec. p. 58); there was no reason even to imagine that a freight car door would be swinging out or that an object would be protruding too far from the side of a flat car, for there were no flat cars or box cars or refrigerator cars in the train, it being a fast passenger train; **and it was not this respondent's train.**

(d) We must not lose sight of the fact that the train from which plaintiff claimed some unknown object was protruding or swinging was not being operated by the Illinois Central, but by the Trustees of the Frisco, which is an entirely different railroad corporation. Therefore, the Illinois Central Railroad Company had neither the duty nor the power to inspect that Frisco train, and could not, by any possibility have discovered, up to the very moment when it passed Haney, that it had an object protruding or swinging from it, if there was any such object.

Bailey v. Stix, Baer & Fuller D. G. Co., 149 Mo. App. 656;

Poe v. I. C. R. R. Co., 73 S. W. (2d) 779;

Hoover v. Baldwin, 111 S. W. (2d) 1011;

Kelley v. Railroad, 105 Mo. App. 365;

Creighton v. Mo. Pac. Ry. Co., 66 S. W. (2d) 980;

Sharp v. Cleaning etc. Co., 300 S. W. 559;

Krampe v. Brewing Co., 59 Mo. App. 277;

Wojtylak v. Coal Co., 188 Mo. 260;

Powell v. Elec. Co., 195 Mo. App. 156;

C. & N. W. Ry. Co. v. Payne, 8 Fed. (2d) 332;

Hicks v. Mo. Pac. R. Co., 40 S. W. (2d) 512.

There is no evidence in the record tending to show that the respondent, Illinois Central Railroad Company, had any actual knowledge of an object either protruding from or swinging from the Frisco train on the occasion in question. Where is there any evidence in the record tending to show that the defendant, Illinois Central Railroad Company, ought to have had such knowledge—in other words, that it had constructive notice? There is no such evidence. How could the Illinois Central Railroad Company know, as the train of another railroad came backing towards its station in the nighttime on such railroad's track over a public street which was unlighted, that there was an object either protruding or swinging

from the side of the train? There was certainly no duty on the part of the Illinois Central Railroad Company to inspect the train of the Frisco Railroad. It was beyond its power to do so, and, therefore, there could be no breach of duty in that respect.

Besides all this, we have proof made by plaintiff's own witness, Drashman, that the Frisco train was inspected at the station shortly after it arrived there and before it had been moved and **that there was no object sticking out of it or swinging from it.** There were no freight cars in the train; as above stated, the doors were vestibule doors, all of which opened inward on the passenger cars (Rec. p. 58), and the doors on the express cars and mail car were sliding doors which could be operated only from the inside of the train and could, in no event, swing out, and the mail catcher arm on the mail car was shown by plaintiff's own witness to have been so situated and equipped that it could not have swung out more than one foot under any circumstances (Rec. pp. 83-84) unless an employee inside of the mail car opened the door and by means of a lever inside of the car deliberately raised the mail catcher arm, and, even then, it could not have hurt anybody standing beside the track, for, to repeat again, at the lowest point it was eighty inches above the ground, when raised it was nine feet above the ground and extended out only thirty-six inches (Haney was only 5 feet 7½ inches tall [Rec. p. 81]), and there was no place anywhere near the scene of the accident where there would be occasion to use the mail catcher arm to take a mail pouch off of a stand provided for that purpose, and Haney's head was six feet from the track after he fell forward (Rec. p. 26) toward the track, so he had been standing at least 11 feet 6½ inches from the track (R. pp. 26-27, 93).

But even if plaintiff had made proof of something sticking or swinging out from the train and killing Haney, his

case would have been wholly wanting in the necessary element of notice to this appellant, even if it was the employer of Haney, of the existence of any object protruding from the train or swinging from it, and, therefore, plaintiff's case would have been wholly insufficient because of utter lack of such proof.

Because of failure to prove notice to defendant, Illinois Central Railroad Company, its demurrer to the evidence should have been sustained.

(e) It is axiomatic that a **defendant cannot be held for damages resulting from negligence unless some duty which rested upon the defendant has been breached.**

In cases of master and servant, it is a well-recognized rule that, while a master owes to his servant the duty to exercise ordinary care to furnish him reasonably safe appliances and a reasonably safe place in which to work, the master is not liable on account of injuries resulting to his servant by the use of appliances not furnished by the master or by reason of dangers incident to a place which is not furnished by the master as a place in which to work and over which the master has no control, so that if it is dangerous he has no power or authority to change it.

The duty to furnish a safe place to work does not require the master to furnish the servant with a place free from defects over which the master has no control.

This rule is recognized throughout this country.

Troth v. Norcross, 111 Mo. 630;
Andrus v. Bradley-Alderson Co., 117 Mo. App. 322;
Loehring v. Westlake Cons. Co. & Roebling Const.
Co., 118 Mo. App. 163;
Powell v. Walker, 195 Mo. App. 150;
Spurling v. LaCrosse Lbr. Co., 204 Mo. App. 29;
Pecher v. Howd, 273 S. W. 752.

Applying the rule in the foregoing cases to the facts in this case, we find that deceased was required by his employer (whoever that employer was, plaintiff claiming it was Illinois Central Railroad Company; but his own proof showing that it was The Yazoo & Mississippi Valley Railroad Company) to go in the night time to throw a switch so as to permit a Frisco train to back into Grand Central Station in Memphis. Plaintiff's own evidence, however, revealed the fact that the switch which the deceased threw was a part of the equipment of the Frisco Railroad and the place where the deceased was standing when fatally injured was not on the Illinois Central property, and the defendant showed it was **in a public street of the City of Memphis** (Rec. p. 107). Therefore, this respondent had no right or authority either to clean up the street and remove the cinders and gravel upon which deceased was standing when injured, or to put up additional lights in said public street. Since there can be no right of recovery for negligence in the absence of the violation of a duty, as where the place to work is beyond the control of the master, it is certain that Illinois Central Railroad Company, even if it could be held to be the employer of Haney, could not properly be held liable to his administrator for damages growing out of his death.

(f) The presence of the cinders and gravel was not the proximate cause of Haney's death. As has been shown, he was perfectly safe there.

"Causa proxima non remota spectatur."

Harper v. St. L. Merch. Bridge Term. Ry. Co., 187 Mo. 575;

Brady v. So. Ry. Co., 64 Fed. (2d) 239, 320 U. S. 476;

Wecker v. Grafeman-McIntosh Ice Cream Co., 31 S. W. (2d) 974, 1. c. 977;

Warner v. Ry., 178 Mo. 134;

Henry v. First Nat'l Bk., 115 S. W. (2d) 121;

State ex rel. Trading Post v. Shain, 116 S. W. (2d)
99.

(g) The Illinois Central Railroad Company, as was clearly and conclusively shown by plaintiff's own evidence, was not the employer of Haney.

We have carefully set forth in our statement of facts in this brief the evidence bearing on the subject of Haney's employment, and instead of repeating it here we respectfully refer the Court to that portion of our statement.

Pay checks for several months preceding Haney's death were identified by his widow and offered in evidence by her counsel. She testified that the endorsements on all except the last two of them were in Haney's own handwriting and that he got the money represented by the checks. As to the last two, one of them having been issued to him but not cashed before his death, and the other having been issued after his death, the endorsement on the back of each of those checks shows that by special arrangement The Yazoo & Mississippi Valley Railroad Company permitted Mrs. Haney to cash those two checks. Both the front and the back of the last check given, which covers the period from December 15, 1939, up to the date of Haney's death, have been reproduced by photostat and a copy will be found on page 90 of the Record.

Mrs. Haney's evidence shows that all of the other checks were precisely like the one of which a copy is reproduced in the abstract except for dates and amounts. Therefore, it was unnecessary to encumber the record with more than one copy, though they were all offered by plaintiff.

Plaintiff's counsel was able to confuse the jury about these checks because the diamond-shaped emblem of the Illinois Central System (a trade name for an association of separately operated railroads) appears printed in two

places upon them; the word "countersigned" appears upon the checks and part of that word is above the emblem and the name "Illinois Central" at the bottom of the checks. But the word "countersigned" evidently refers, not to the emblem and the printed name, but to the name of the person who countersigned the check and whose name was C. E. Lyon.

It is not at all uncommon for an association of railroads to use a certain design on all their advertising matter and on their checks as well. For instance, we are all familiar with the banner that appears as the emblem of the Wabash, the keystone of the Pennsylvania, the triangle of the Alton, the red seal of the Missouri Pacific and the emblems used by other railroads, all of which refer to an association of which an individual railroad is a part. The undisputed evidence shows that the Illinois Central System is merely an unincorporated association made up of three separate and distinct railroad corporations, one of which is The Yazoo & Mississippi Valley Railroad Company. Each is a separate and distinct corporation. There is no legal entity of which the three are parts. It appears plainly on the face of the check in large letters at the top thereof that the check is that of The Yazoo & Mississippi Valley Railroad Company. The check is drawn on the treasurer of **that** company. The mere fact that a printed emblem with the name "Illinois Central" appears in two places on the check is wholly immaterial. Nowhere on the check does the corporate name of this appellant (Illinois Central Railroad Company) appear. Even if it had appeared from the evidence (which it did not) that The Yazoo & Mississippi Valley Railroad Company was a wholly owned subsidiary of the Illinois Central Railroad Company, nevertheless the entity of The Yazoo & Mississippi Valley Railroad Company would have remained wholly distinct from that of the Illinois Central Railroad Company, and the suit could not have been maintained against the Illinois Central

Railroad Company for the negligence of The Yazoo & Mississippi Valley Railroad Company. One corporation may not be held for the negligence of another.

Plaintiff's attempts, through oral testimony of Mrs. Haney and her son and daughter, to show that Haney wore a button with the name of the Illinois Central Railroad Company on it and that he had a pass issued by that company were not sufficient to establish the fact of his employment by The Illinois Central Railroad Company, as distinguished from The Yazoo & Mississippi Valley Railroad Company. The evidence of these three witnesses was so vague and contradictory that it proved nothing.

Then we have the testimony of the witness Brusco, who identified a button of the Brotherhood of Railroad Trainmen, a picture of which (Ex. 2) is found in the record on page 110-A, and the type of annual pass (Ex. 1), which is reproduced by photostat on page 100-A of the record. Although Mrs. Haney and her son were called as witnesses in rebuttal, neither of them testified in rebuttal that the button and the pass which Brusco had identified were different from those which Haney carried.

In addition to all that, Haney's superior, Mr. Burns (Ree. pp. 132-135), the trainmaster for The Yazoo & Mississippi Valley Railroad Company, whose duty it was to employ switchmen and switch tenders, testified positively that he was employed by The Yazoo & Mississippi Valley Railroad Company alone, and that he knew of his own knowledge that Haney, who was under him, was employed by that railroad company alone. There is no competent evidence to dispute this.

The testimony of Mr. Young, now in the employ of the U. S. Government but formerly superintendent of terminals for the Frisco, explained very clearly the relationship of the three railroads making up the Illinois Central System, and told how the bills were made out each month by the Yazoo & Mississippi Valley Railroad Company for

the services rendered by Haney as a switch tender and how the Illinois Central Railroad Company was billed by the Yazoo & Mississippi Valley Railroad Company for such two-twelfths, which the evidence showed the Frisco paid the Illinois Central Railroad Company. Thus it clearly appears that the Illinois Central did not pay the two-twelfths, but the Frisco. The Illinois Central was merely a convenient collecting intermediary.

But even if Haney had been in the employ of the Illinois Central Railroad Company, when he was loaned to the Frisco Railroad Company, or hired to it, to perform certain duties, then when he engaged in those duties he was the servant of the Frisco Railroad Company and not the servant of the Illinois Central Railroad Company.

A very excellent and learned discussion of just such situation is found in an opinion by Chief Justice Taft in the case of *Linstead v. Chesapeake & Ohio Ry. Co.*, 276 U. S. 28, which held that an engine crew which was regularly employed by the Big Four Railroad Company but was turned over to the Chesapeake & Ohio Railway Company to do certain switching at a certain point, was, while doing such switching, in the employ of the Chesapeake & Ohio Railway Company, and when one of the men was injured he could not maintain a suit for damages under the Federal Employers' Liability Act against the Big Four Railroad Company, for which most of his services were rendered.

Other authorities support the same proposition. See:

Denton v. Y. & M. V. R. Co. et al., 284 U. S. 305, 52 S. Ct. 141, and cases therein cited.

There is no doubt whatever that the action in the case at bar is under the Federal Employers' Liability Act. That act alone fixes the rights of employees who are injured or killed while engaged in interstate commerce.

Plaintiff alleged that Haney and the defendant railroads were engaged in interstate commerce, and proved that fact. Therefore, since said Act is the only one under which recovery by a servant of a railroad can be had when doing such work as Haney was doing, and since the only persons who are entitled to the benefit of that Act are servants of railroads, it follows that Haney's representative cannot recover against the Illinois Central Railroad Company unless Haney was the servant of that railroad company at the time of his fatal injury. The evidence just reviewed showed that he did not bear that relationship to the Illinois Central Railroad Company. Therefore, there can be no recovery by his personal representative in this case against the Illinois Central Railroad Company.

The outstanding distinction between facts in the cases relied on by petitioner and the facts in this case is that in those cases **there was no question at all but that the operation of a train injured or killed the servant in question.** At least, there was ample evidence in every one of such cases clearly justifying submission to the jury of the issue of injury or death resulting from the operation of a train by defendant or its lessee; while in the case at bar the evidence clearly shows that the decedent was not killed by the operation of a train operated by defendant or its lessee, nor was there any substantial evidence from which a jury could properly have found that he was so killed, rather than by a cause for which this respondent was in no wise liable. The plain fact is that deceased met his death when assaulted and robbed by an unknown assailant.

CONCLUSION.

While the Supreme Court of Missouri assigned but one reason for holding that the plaintiff failed to make out a case entitling him to have it submitted to the jury, there

were various other reasons above discussed on account of which, we respectfully submit, this court could properly hold that the Supreme Court of Missouri did right in reversing the judgment outright on account of failure of plaintiff to produce sufficient substantial evidence to warrant submission of the case to the jury.

We briefly summarize here our reasons for the above statement:

(a) As held by the Missouri Supreme Court the verdict rests purely upon speculation and guesswork as to what cause produced the death of Haney. The decision of the Missouri court is not properly subject to review by this court no matter what may be thought to be the province of a jury. There was no competent evidence for the jury to consider.

(b) Even if the accident happened as claimed by plaintiff, such accident was so unusual that it could not reasonably be foreseen by a reasonably prudent person exercising ordinary care.

(c) Even if it was negligence on the part of the Frisco Railroad Trustees to operate its train so that a mail catcher arm might swing out one foot, this defendant could not be liable, because there was no evidence tending to show that it had notice of such condition. (Parenthetically we may add that if the mail catcher arm swung out one foot and struck Haney, more than a foot below it, there is no fact from which it could be reasonably inferred that it did so because of negligence on the part of the Frisco Trustees.)

(d) Plaintiff's evidence wholly failed to reveal that the accident happened on Illinois Central property or on property over which it had any right to exercise control, and therefore, it could not be liable for failure to furnish light

at said place or to remove the cinders and gravel north of the Frisco track.

The undisputed evidence showed that the point of accident was on a public street in the City of Memphis.

(e) No causal connection was shown between the presence of the cinders and gravel and the happening of the accident. He was safe there.

(f) The undisputed evidence—documentary evidence—offered by the plaintiff showed that Haney was an employee of the Yazoo & Mississippi Valley Railroad Company, not of the Illinois Central Railroad Co., and this was corroborated by undisputed evidence offered by this respondent.

(g) Frisco train No. 106 was not operated by the respondent.

It is, therefore, respectfully urged that the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 550.—OCTOBER TERM, 1945.

Walter A. Lavender, Administrator
de bonis non of the Estate of L. E.
Haney, Deceased, Petitioner,

vs.

J. M. Kurn; et al., Trustees of St.
Louis-San Francisco Railway Com-
pany, Debtor, and Illinois Central
Railroad Company.

On Writ of Certiorari to
the Supreme Court of
the State of Missouri.

[March 25, 1946.]

Mr. Justice MURPHY delivered the opinion of the Court.

The Federal Employers' Liability Act permits recovery for personal injuries to an employee of a railroad engaged in interstate commerce if such injuries result "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U. S. C. § 51.

Petitioner, the administrator of the estate of L. E. Haney, brought this suit under the Act against the respondent trustees of the St. Louis-San Francisco Railway Company, Frisco, and the respondent Illinois Central Railroad Company. It was charged that Haney, while employed as a switchtender by the respondents in the switchyard of the Grand Central Station in Memphis, Tennessee, was killed as a result of respondents' negligence. Following a trial in the Circuit Court of the City of St. Louis, Missouri, the jury returned a verdict in favor of petitioner and awarded damages in the amount of \$30,000. Judgment was entered accordingly. On appeal, however, the Supreme Court of Missouri reversed the judgment, holding that there was no substantial evidence of negligence to support the submission of the case to the jury. 189 S. W. 2d 254. We granted certiorari to review the propriety of the Supreme Court's action under the circumstances of this case.

It was admitted that Haney was employed by the Illinois Central, or a subsidiary corporation thereof, as a switch-tender in the railroad yards near the Grand Central Station, which was owned by the Illinois Central. His duties included the throwing of switches for the Illinois Central as well as for the Frisco and other railroads using that station. For these services, the trustees of Frisco paid the Illinois Central two-twelfths of Haney's wages; they also paid two-twelfths of the wages of two other switch-tenders who worked at the same switches. In addition, the trustees paid Illinois Central \$187 $\frac{1}{2}$ for each passenger car switched into Grand Central Station, which included all the cars in the Frisco train being switched into the station at the time Haney was killed.

The Illinois Central tracks run north and south directly past and into the Grand Central Station. About 2700 feet south of the station the Frisco tracks cross at right angles to the Illinois Central tracks. A west-bound Frisco train wishing to use the station must stop some 250 feet or more west of this crossing and back into the station over a switch line curving east and north. The events in issue center about the switch several feet north of the main Frisco tracks at the point where the switch line branches off. This switch controls the tracks at this point.

It was very dark on the evening of December 21, 1939. At about 7:30 p.m. a west-bound interstate Frisco passenger train stopped on the Frisco main line, its rear some 20 or 30 feet west of the switch. Haney, in the performance of his duties, threw or opened the switch to permit the train to back into the station. The respondents claimed that Haney was then required to cross to the south side of the track before the train passed the switch, and the conductor of the train testified that he saw Haney so cross. But there was also evidence that Haney's duties required him to wait at the switch north of the track until the train had cleared, close the switch, return to his shanty near the crossing and change the signals from red to green to permit trains on the Illinois Central tracks to use the crossing. The Frisco train cleared the switch, backing at the rate of 8 or 10 miles per hour. But the switch remained open and the signals still were red. Upon investigation Haney was found north of the track near the switch lying face down on the ground, unconscious. An ambulance was called, but he was dead upon arrival at the hospital.

Haney had been struck in the back of the head, causing a fractured skull from which he died. There were no known eye-witnesses to the fatal blow. Although it is not clear there is evidence that his body was extended north and south, the head to the south. Apparently he had fallen forward to the south, his face was bruised on the left side from hitting the ground and there were marks indicating that his toes had dragged a few inches southward as he fell. His head was about 7 1/2 feet north of the Frisco tracks. Estimates ranged from 2 feet to 14 feet as to how far west of the switch he lay.

The injury to Haney's head was aggravated by a gash about two inches long from which blood flowed. The top of Haney's white cap had a corresponding "black mark" about an inch and a half long and an inch wide, running at 45 angle downward to the right of the center of the back of the head. A spot of blood was later found at a point about 4 feet south of the head. The conclusion following an autopsy was that Haney's skull was fractured by "some fast moving object" which "came from the examining direction" (his head) but could not have been attached to a train because at the rate of 30 mph. in one hour. But he also admitted that the fracture could have resulted from a blow from a cap or some other small object held in the hands of an individual.

Kilbourn's theory is that Haney was struck by a train and or that he was hit by a train. He also stated that he did not know of any other witnesses to the accident.

The following table shows the estimated time of the accident based on the assumption that the train was traveling at 30 mph. The time of the accident is estimated to be between 11:15 and 11:30 a.m.

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inches above the highest parts of the mound. Haney was 67½ inches tall. If he had been standing on the mound about a foot from the side of the mail car he could have been hit by the end of the mail hook, the exact point of contact depending upon the height of the mound at the particular point. His wound was about 4 inches below the top of his head, or 63½ inches above the point where he stood on the mound — well within the possible range of the mail hook end.

Respondents' theory is that Haney was murdered. They point to the estimates that the mound was 10 to 15 feet north of the rail, making it impossible for the mail hook end to reach a point of contact with Haney's head. Photographs were placed in the record to support the claim that the ground was level north of the rail for at least 10 feet. Moreover, it appears that the area immediately surrounding the switch was quite dark. Witnesses stated that it was so dark that it was impossible to see a 3-inch pipe 25 feet away. It also appears that many hoboes and tramps frequented the area at night in order to get rides on freight trains. Haney carried a pistol to protect himself. This pistol was found loose under his body by those who came to his rescue. It was testified, however, that the pistol had apparently slipped out of his pocket or scabbard as he fell. Haney's clothes were not disarranged and there was no evidence of a struggle or fight. No rods, pipes or weapons of any kind, except Haney's own pistol, were found near the scene. Moreover, his gold watch and diamond ring were still on him after he was struck. Six days later his unsoiled billfold was found on a high board fence about a block from the place where Haney was struck and near the point where he had been placed in an ambulance. It contained his social security card and other effects, but no money. His wife testified that he "never carried much money, not very much more than \$10." Such were the facts in relation to respondents' theory of murder.

Finally, one of the Frisco foremen testified that he arrived at the scene shortly after Haney was found injured. He later examined the fireman's side of the train very carefully and found nothing sticking out or in disorder. In explaining why he examined this side of the train so carefully he stated that while he was at the scene of the accident "someone said they thought that train No. 106 backing into Grand Central Station is what struck

this man" and that Haney "was supposed to have been struck by something protruding on the side of the train." The foreman testified that these statements were made by an unknown Illinois Central switchman standing near the fallen body of Haney. The foreman admitted that the switchman "didn't see the accident." This testimony was admitted by the trial court over the strenuous objections of respondents' counsel that it was mere hearsay falling outside the *res gestae* rule.

The jury was instructed that Frisco's trustees were liable if it was found that they negligently permitted a rod or other object to extend out from the side of the train as it backed past Haney and that Haney was killed as the direct result of such negligence, if any. The jury was further told that Illinois Central was liable if it was found that the company negligently maintained an unsafe and dangerous place for Haney to work, in that the ground was high and uneven and the light insufficient and inadequate, and that Haney was injured and killed as a direct result of the said place being unsafe and dangerous. This latter instruction as to Illinois Central did not require the jury to find that Haney was killed by something protruding from the train.

The Supreme Court, in upsetting the jury's verdict against both the Frisco trustees and the Illinois Central, admitted that "It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches." But it held that "all reasonable men would agree that it would be mere speculation and conjecture to say that Haney was struck by the mail hook" and that "plaintiff failed to make a submissible case on that question." It also ruled that there "was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney." Finally, the Supreme Court held that the testimony of the foreman as to the statement made to him by the unknown switchman was inadmissible under the *res gestae* rule since the switchman spoke from what he had heard rather than from his own knowledge.

We hold, however, that there was sufficient evidence of negligence on the part of both the Frisco trustee and the Illinois Central to justify the submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury.

The evidence we have already detailed demonstrates that there was evidence from which it might be inferred that the end of the mail hook struck Haney in the back of the head, an inference that the Supreme Court admitted could be drawn. That inference is not rendered unreasonable by the fact that Haney apparently fell forward toward the main Frisco track so that his head was 5½ feet north of the rail. He may well have been struck and then wandered in a daze to the point where he fell forward. The testimony as to blood marks some distance away from his head lends credence to that possibility, indicating that he did not fall immediately upon being hit. When that is added to the evidence most favorable to the petitioner as to the height and swing-out of the hook, the height and location of the mound and the nature of Haney's duties, the inference that Haney was killed by the hook cannot be said to be unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury.

It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence becomes irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under the circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See *Palmer v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67, 68; *Roberts v. Central Vermont R. R. Co.*, 319 U. S. 350, 354-354; *Townsend v. Prange & P. L. Ry. Co.*, 321 U. S. 29, 35, 8 Cal. Minn. 221; *Friends in Judicial Interpretation of Railroad Cases Under Federal Employers' Liability Act*, 29 *Marquette L. Rev.* 73.

It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute of the kind where evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is

a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

We are unable, therefore, to sanction a reversal of the jury's verdict against Frisco's trustees. Nor can we approve any disturbance in the verdict as to Illinois Central. The evidence was uncontradicted that it was very dark at the place where Haney was working and the surrounding ground was high and uneven. The evidence also showed that this area was entirely within the domination and control of Illinois Central despite the fact that the area was technically located in a public street of the City of Memphis. It was not unreasonable to conclude that these conditions constituted an unsafe and dangerous working place and that such conditions contributed in part to Haney's death, assuming that it resulted primarily from the mail hook striking his head.

In view of the foregoing disposition of the case, it is unnecessary to decide whether the allegedly hearsay testimony was admissible under the *res gestae* rule. Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act. But inasmuch as there is adequate support in the record for the jury's verdict apart from the hearsay testimony, we need not determine whether that discretion was abused in this instance.

The judgment of the Supreme Court of Missouri is reversed and the case is remanded for whatever further proceedings may be necessary not inconsistent with this opinion.

Reversed.

The CHIEF JUSTICE and Mr. Justice FRANKFURTER concur in the result.

Mr. Justice REED dissents.

Mr. Justice JACKSON took no part in the consideration or decision of this case.